

Department of Private Law

**Unjustified Enrichment
Liability and Estoppel**

Unjustified Enrichment Liability

Compiled by
Prof C-J Pretorius
Prof JC Knobel

Study guide 2 for
PVL3043

University of South Africa
Pretoria

© 2008 University of South Africa

All rights reserved

Printed and published by the
University of South Africa
Muckleneuk, Pretoria

PVL3043/2/2009-2011

98291548

3B2

CONTENTS

Study units	Page
1 GENERAL OVERVIEW AND INTRODUCTION TO ESTOPPEL	1
1.1 General overview	1
1.2 Introduction to estoppel	3
1.2.1 Meaning of the concept “estoppel”	3
2 THE ENGLISH AND SOUTH AFRICAN LAW OF ESTOPPEL	6
2.1 Origin and development in English law	6
2.2 Reception of the English-law principles of estoppel by representation	9
2.3 Requirements of English law for estoppel by representation	12
3 REQUIREMENTS FOR A SUCCESSFUL RELIANCE ON ESTOPPEL: INTRODUCTION; MISREPRESENTATION	14
3.1 Introduction	16
3.2 Misrepresentation	16
3.2.1 Representation	16
3.2.2 Misrepresentation	18
3.2.3 Misrepresentation by an omission (<i>omissio</i>)	20
3.2.4 Misrepresentation where an owner entrusts his or her property to the possession of another	21
3.2.5 The person to whom the misrepresentation must be made	23
4 REQUIREMENTS FOR A SUCCESSFUL RELIANCE ON ESTOPPEL: FAULT	26
4.1 Introduction: intent and negligence	27
4.2 The negligence requirement in South African case law	29
4.3 Cases where negligence is not required	34
4.3.1 Cases where the <i>rei vindicatio</i> is not applicable	34
4.3.2 A possible exception: the agent for sale or factor	36
4.4 Fault on the part of the deceived person	37
5 REQUIREMENTS FOR A SUCCESSFUL RELIANCE ON ESTOPPEL: PREJUDICE	40
5.1 Introduction	41
5.2 Two approaches	41

6	REQUIREMENTS FOR A SUCCESSFUL RELIANCE ON ESTOPPEL: CAUSATION	46
6.1	Introduction: factual and legal causation	47
6.2	The “proximate cause” test	47
7	REQUIREMENTS FOR A SUCCESSFUL RELIANCE ON ESTOPPEL: THE RELIANCE ON ESTOPPEL MUST BE PERMISSIBLE IN LAW	52
7.1	Introduction	53
7.2	Illegal or invalid acts	54
7.3	<i>Ultra vires</i> acts	55
7.4	Status and legal capacity	56
7.5	Hire-purchase contracts (credit agreements)	57
7.5.1	Introduction	57
7.5.2	Hire-purchase transactions in case law	58
7.5.3	Conclusion	63
8	THE APPLICATION OF ESTOPPEL IN CERTAIN PRACTICAL INSTANCES	66
8.1	Introduction	68
8.2	Estoppel and the <i>rei vindicatio</i>	68
8.2.1	The effect of a successful reliance on estoppel against the <i>rei vindicatio</i>	69
8.3	Estoppel and representation in terms of mandate	70
8.4	Estoppel and partnership	71
8.5	Estoppel and the conclusion of a contract	71
8.6	Estoppel and waiver of rights	75
9	THE BASIS AND NATURE OF ESTOPPEL	78
9.1	Introduction	79
9.2	The <i>exceptio doli</i>	79
9.3	The maxim <i>nemo contra suum factum venire debet</i>	81
9.4	Protection of good faith	81
9.5	Misrepresentation	82
9.6	Estoppel as a rule of evidence	86
9.7	Estoppel as a legal remedy <i>sui generis</i>	86

GENERAL OVERVIEW AND INTRODUCTION TO ESTOPPEL

1.1 GENERAL OVERVIEW

Please refer to the general overview in *Study guide 1 (Enrichment liability)*, which also applies to this part of the module.

STUDY MATERIAL

study material

There is no prescribed book for this part of the module. Your study material consists of this study guide and a number of cases which are listed under “Prescribed study material” in the study guide and in *Tutorial letter 101*. All these judgments, as well as further judgments **discussed** in the study guide, form part of your prescribed study material. It is sufficient that you study the prescribed cases in so far as they are discussed in the study guide. Material mentioned under the heading “Additional reading material” does not form part of your prescribed study material and therefore need not be looked up and studied for examination purposes. However, **all material discussed in this study guide** is relevant for examination purposes, unless specifically indicated otherwise. These references are given to you not only for the sake of completeness but because they may be of value to you if you want to expand your knowledge and understanding of the subject or if you need to do further research for assignment purposes. In the course of the year, additional material may be prescribed in further tutorial letters. **All the prescribed material is very important. Everything forms an integral part of the module and must be studied intensively for examination purposes.**

additional reading matter

We shall also refer you to judgments, journal articles or textbooks under the heading “Additional reading material (optional)”. These references do not form part of your prescribed study material and therefore need not be looked up and studied for examination purposes. They are given to you for the sake of completeness and may be of value should you need to do further research in practice or for academic studies. The prescribed material constitutes the basis of your study of the law of estoppel, but the additional material will provide greater knowledge of and insight into problematic aspects of this area of law. Standard textbooks that are valuable works of reference and will be referred to, but which are not prescribed for this module, include the following:

De Wet “*Estoppel by representation*” in *die Suid-Afrikaanse Reg* (dissertation 1939)

Spencer Bower & Turner *The law relating to estoppel by representation* (3rd ed 1977) (This work deals exclusively with the English law of estoppel, but can be usefully consulted.)

Rabie (updated by Daniels) “*Estoppel*” Volume 9 *LAWSA* (2nd ed 2005)

Rabie & Sonnekus *The law of estoppel in South Africa* (2nd ed 2000)

Visser & Potgieter *Estoppel: cases and materials* (1994)

examples and self-assessment	The examples given throughout the study guide serve to illustrate its content. Examples are quite often taken from case law and can appear in examination questions in the same or in a slightly different form. The same applies to the self-assessment questions in the text and at the end of each study unit. These questions can be used to determine whether you understand the content and can apply it. The feedback that follows on the self-assessment questions can be used as a guideline to help you with your self-assessment. If you are unable to complete the self-assessment questions you need to revisit the basic study material and ensure that you understand the content within the given context.
study journal	You may consider creating a study journal in which you write down your answers to the various activities and self-assessment exercises throughout the study guide. The journal will be a valuable tool to assess your own understanding of the material, your newly acquired skills and your progress with the module. The activities and self-assessment exercises serve as examples of the type of questions you may expect in the examination. They may also be reused in examinations.
guide content	For a proper and thorough grasp of estoppel in our modern law it is necessary to read the historical development of estoppel in English law and study its reception into South African law. Important sections of the study material deal with the requirements for estoppel and its application in certain practical instances, while a discussion of its basis rounds off the content of the study guide. In the study of estoppel you should pay attention to <ul style="list-style-type: none">• the origin of estoppel and the requirements for successful reliance on estoppel• the application of estoppel in certain practical instances• the basis of estoppel• various conflicting points of view: you should be able to critically assess these

EXAMINATION

In preparing for your examination it is important that you have a good grasp and knowledge of the subject matter. You must know the general requirements and the specific requirements, and you must be able to apply the rules to practical scenarios. In the examination you will be asked to deal with three types of questions:

- straightforward theoretical questions that require a systematic discussion of aspects of the material
- problem-type questions that describe a practical scenario and require you to
 - identify the legal issue or question raised (1–2/10)
 - discuss the relevant rules that may be applicable to these facts (3–4/10)
 - apply the rules to the facts (3–4/10)
 - provide a solution to the problem (1–2/10)

- questions that required a critical assessment of a theoretical or practical approach, viewpoint or differences of opinion, where you are required to
 - recognise the issue (1–2/10)
 - summarise the different viewpoints (3–4/10)
 - evaluate each viewpoint critically (3–4/10)
 - provide your own reasoned viewpoint (1–2/10)

It is important to note that when you are asked to provide a critical assessment, you have to evaluate the argument, case or legal position both from a positive and a negative point of view. In other words, a full assessment is required. To assess critically does not only mean to criticise negatively, but also requires you to highlight any positive aspects. Critical assessment requires more than just a description of the case or legal position; it requires an assessment with opinions on whether it is good or bad, positive or negative, and so on.

For examples of a critical discussion incorporating both positive and negative assessments and a conclusion, see

- 2 in study unit 2 dealing with the reception of English law
- 2 in study unit 5 dealing with prejudice

1.2 INTRODUCTION TO ESTOPPEL

OVERVIEW

In this part of the study unit we introduce you to the doctrine of estoppel, its meaning and how it is applied.

SELF-EVALUATION GOALS

After completing this study unit you should be able to

- explain what estoppel is
- provide an example of an application of estoppel

1.2.1 Meaning of the concept “estoppel”

estop

In its general sense the old English word “estop” means to **bar** or **preclude**. It comes from the Latin *stoppa*, which is also the root of the word “stop”. Hence, in a general sense the word “estop” means to prevent somebody from doing something. However, even in medieval Latin we find that “estop” is sometimes given a more restricted meaning, that is to “estop” (prevent) somebody from doing something at law.

Spencer Bower 3 says the following about the meaning of the term “estop” (or “estoppel”):

The word “estop” is an ancient English word which originally bore precisely the same signification as the equally ancient English word

“stop”, whereof it is merely a variant. The latter, however, of the two forms, with its substantive “stoppage”, has alone survived in general use, whilst the former, together with its substantive “estoppel” has been exclusively employed in English jurisprudence, which has assigned to it a special and technical connotation of its own.

Today, therefore, “estop” and “estoppel” are technical terms used exclusively in the legal sense.

definition

In broad general terms it may be said that estoppel is a doctrine which operates in the following circumstances: Where one person represents to another that a certain set of facts exists, and the other, as a result of such representation, alters his or her own legal position to his or her detriment, the person making the representation is precluded or **estopped** from asserting that a different set of facts actually exists.

example

A striking illustration of this definition is furnished by the facts in the case of *Thomas v Baumann & Gilfillan* 1914 TPD 197. Here Mrs Thomas undertook to pay to B and G a sum which her brother owed to them. This was a contract of suretyship and she was therefore protected by the (now revoked) *senatus consultum (SC) Velleianum*, unless she owed her brother an equal or larger amount. She led B and G to believe that she actually owed her brother an amount larger than that which she had undertaken to pay. When she was sued by B and G for payment of debt she raised the defence of the *senatus consultum Velleianum*. The court decided that she was not entitled to the protection of the SC, since she had undertaken to pay the debt of her creditor; and even if Mrs Thomas in this case had not been her brother’s debtor, she would have had to be treated as such, by reason of her representation to B and G who had acted upon it to their prejudice.

summation

Briefly, therefore, the doctrine amounts to this: where a person, relying on the misrepresentation(s) made by another, acts to his or her detriment, such a person may hold the other to his or her misrepresentation in the sense that he or she can prevent (estop) the other from relying on the true state of affairs. In general, one may say that the law of estoppel holds a person to the representations he or she makes by means of his or her words or conduct.

SELF-ASSESSMENT

- (1) Explain the concept “estoppel” and give an example.

FEEDBACK

- (1) See 1.2.1. Consider the differences between estoppel, unjustified enrichment, contracts and delicts. Are you able to distinguish between these legal concepts clearly to avoid confusion? Students tend to marginalise this area of law because it is reminiscent of the law of delict, especially regarding the requirements for estoppel (see section 5 in study unit 9). Estoppel also has close ties with a contract based on the reliance theory, but there are important differences (see section 8.5 in study unit 8). Although estoppel and unjustified enrichment have little in common, estoppel may find application in an enrichment problem

and as a result students sometimes confuse these concepts in examinations. It is therefore **vital** to have a clear understanding of what the concept “estoppel” means and how it may be distinguished from the sources of obligation mentioned above. Return to the definition of estoppel and make sure that you can distinguish it clearly from unjustified enrichment, contracts and delicts.

THE ENGLISH AND SOUTH AFRICAN LAW OF ESTOPPEL

OVERVIEW

In this study unit we give you an overview of the historical origins of the English and South African law of estoppel.

SELF-EVALUATION GOALS

After completing this study unit you should be able to

- explain briefly how the reception of the English law of estoppel into South African law took place
- explain whether South African courts are bound by decisions of the courts of England on the law of estoppel

PRESCRIBED CASE LAW

Trust Bank van Afrika Bpk v Eksteen 1964 (3) SA 402 (A) (as quoted below)

ADDITIONAL READING MATERIAL (OPTIONAL)

Rabie *LAWSA* par 654–655

Van der Merwe & Van Huyssteen “A perspective on the elements of estoppel by representation” 1988 *TSAR* 568–569

Baumann v Thomas 1920 AD 428

2.1 ORIGIN AND DEVELOPMENT IN ENGLISH LAW

This section is provided as background material only. You must read through it **but need not study** it.

Lord Coke, the famous English judge, distinguished three kinds of estoppel: “There be three kinds of estoppels, viz by matter of record, by matter in writing and by matter *in pais*” (2 Coke on Litt. 352a). “Estoppel by matter in writing” is usually referred to as “estoppel by deed”. It is usually accepted that estoppel by representation (estoppel based on misrepresentation — the form of estoppel we are studying) developed out of the estoppel *in pais*. Further, it is fairly generally

accepted that the various forms of estoppel developed in the following chronological order: first estoppel by record, then estoppel by deed, and finally estoppel *in pais*. Not a single English writer explains just how estoppel by representation developed out of estoppel *in pais* (De Wet 1–2) bibliography in study unit 1.

What do these different forms of estoppel mean? We have already briefly discussed (in study unit 1) the basic underlying idea of estoppel by representation. Estoppel by record was the doctrine whereby the contents of documents formally drawn up by the royal court could not be gainsaid; everyone was estopped from denying the truth of the contents. Estoppel by deed was the doctrine whereby the contents of an official document or “deed” on which the royal seal appeared, could not be denied; everyone was therefore estopped from denying the correctness of the contents. As will become clearer below, estoppel *in pais* was concerned with the transfer of land; in certain circumstances the transfer could not be denied.

De Wet 2–5 holds the view that all three forms of estoppel relate to the transfer of land. The law relating to the transfer of land in England originated in Germanic law. The transfer of land was achieved by means of a formal act. Originally the transfer took place by means of the handing over, on the land itself, of a sod, a twig or a blade of grass from that land, in the presence of witnesses. Thus it was a formal and symbolic act. Later the symbolic act did not necessarily take place on the land itself. As the art of writing became more common, it became customary for one of the witnesses to reduce to writing the facts of the transfer. Such a document could assume two forms: an exposition of the events (evidentiary document) or a statement by the transferor (dispositive document). The dispositive document was derived from the postclassical *traditio per cartam* of Roman law. The document (*carta*) gradually replaced the symbolic delivery of a sod or a blade of grass. The *carta* became part of the formal act of transfer and represented the land. Later still, the formal transfer took place by way of an evidentiary document *coram lege loci*; the transfer took place before the law. The judicial officer made a note of the transfer in the official books (the predecessor of the system of registration). All of the abovementioned formal acts of transfer performed before witnesses could not be denied or gainsaid later; thus everyone was estopped from challenging the transfer. De Wet 5 therefore takes the view that estoppel *in pais* (in the country, on the land itself) originated first (the symbolic delivery on the land itself cannot be denied); then estoppel by deed (the contents of the document drawn up by the witness cannot be denied); and finally the estoppel by record (the noted transfer before the law cannot be denied). De Wet’s view seems more acceptable than the traditional one held by the English writers, as we have already explained above.

All three forms of estoppel therefore meant that a person could not challenge the validity of an act of transfer of land which had taken place in the presence of witnesses; he was estopped from doing so by an estoppel *in pais* or estoppel by deed or estoppel by record.

A far more important deduction, however, is that estoppel by representation did not develop out of one of Coke’s estoppels, but must have had an entirely different origin.

De Wet 5–9 points out that the modern estoppel by representation developed out of the English system of equity. Equity developed as a counter to the formalism, narrowness and rigidity of the old English common law. In common

law a contract embodied in a formal document (covenant) could not be challenged, even if the contract had been brought about by fraud: a covenant was a deed and a deed could not be challenged (estoppel by deed). The aggrieved party could, however, approach the courts of equity for relief; under the system of equity the deceived party was not liable in terms of such a covenant. Equity not only released a party from obligations, but also came to the aid of a party who, acting on the representations of another, had been deceived into changing his position to his detriment. The courts of chancery, which applied equity, therefore began to develop liability based on misrepresentation (fraud). Relief initially took the form of damages awarded to the aggrieved.

In 1649 the Chancery Court first granted a form of relief other than damages in a case of intentional misrepresentation (fraud). In *Hunt v Carew* the defendants, who had fraudulently professed that they had authority to let a piece of land, were held to their representations — they were, in effect, estopped from relying on the true facts, that is that they had no such authority. The defendants therefore had to uphold the impression they had created. Here, therefore, we have an application of the doctrine of estoppel by representation (estoppel based on misrepresentation). Initially, a defendant was estopped from denying his misrepresentations only if he had acted **intentionally**. In 1682 it was accepted that **negligent** misrepresentation also binds the maker (*Hobbs v Norton*).

On the other hand, common law applied the principle of estoppel by representation for the first time in 1762 in the famous case of *Montefiori v Montefiori*. In this case Joseph and his brother Moses conspired to give a certain woman the (incorrect) impression that Joseph was a very rich man. Moses told her that he owed Joseph a large sum of money. To confirm his lie he gave Joseph a promissory note for that amount. The woman married Joseph. Moses reclaimed the promissory note from Joseph. However, the court held that Moses was bound by the impression he had created in the woman's mind and that, against her, he was obliged to make good that impression. His claim failed. Lord Mansfield held: "Where third persons represent anything material, in a light different from the truth, they shall be bound to make good the thing in the manner in which they represented it. It shall be as represented to be." Gradually the principles of estoppel by representation came to be generally applied in common law (eg *Young v Grote* in De Wet 8).

The first conscious formulation of the principle of estoppel by representation is to be found in *Pickard v Sears* (1837):

The rule is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time.

In later judgments, notably *Freeman v Cooke*, it became apparent that estoppel by representation is applicable not only when the deception is intentional (wilful), but also in cases of unintentional misrepresentation. Whether English law requires **negligence** to be present in cases of unintentional misrepresentation is a controversial question. It would appear that English law does not require negligence **in principle**, but does lay down certain other

requirements which, **in practice**, are tantamount to a requirement of negligence (see below).

2.2 RECEPTION OF THE ENGLISH-LAW PRINCIPLES OF ESTOPPEL BY REPRESENTATION

This section must be **studied**.

The **reception** into our law of the English law of estoppel took place by means of the well-known methods by which principles of English law were usually introduced into our law in the past: firstly, the English legal term “estoppel” gradually began to make its appearance in judgments of the courts; secondly, the proven formula of stating that English legal principles of estoppel were practically identical to the relevant principles of Roman-Dutch law, and thereafter simply applying English law, was used.

In 1906 Lord de Villiers warned against the use of the term “estoppel” (*in re Reynolds Vehicle and Harness Factory Ltd* 23 SC 703). By that time, however, it had already become reasonably common to use the term “estoppel” (cf eg *Kristal v Rowell* 1904 TH 66). The result of the use of the **term** was that the **principles** underlying it, that is the principles of the English law of estoppel, gradually came to be commonly used and applied.

The second method used to introduce the principles of English law is illustrated by the following *dictum* of Kotze CJ: “Now the doctrine of estoppel is likewise recognised by our law, as sufficiently appears from the exception *doli mali*, the rule *nemo ex suo delicto meliorem conditionem suam facere potest*, and others” (*Smith and Race v Philips; Lazarus v Levy* 1893 Hertzog 50).

Roman and Roman-Dutch law did in fact know principles and maxims based on the same **idea** as that of the English-law principles of estoppel by representation, but without any accompanying comprehensive, detailed and sophisticated doctrine. Our law and Roman-Dutch law therefore never recognised any “doctrine of estoppel”, as Kotze CJ implied. However, the mere fact that Roman-Dutch law recognised the **concept** which forms the nucleus of estoppel by misrepresentation did clear the way for the reception, along judicial lines, of the comparatively sophisticated English-law doctrine of estoppel by representation. The application of this method culminated in *Waterval GM Co v New Bullion GM Co* 1905 TS 717. Pay careful attention to the following *dictum* of Curlewis J at 722:

The doctrine of estoppel *in pais*, as expounded by the later decisions in England and America, though not known to our law under that name, is analogous to what was known in Roman law as the *exceptio doli mali*. This special form of defence allowed by the Roman law was introduced by the praetor, so that a person should not, by reason of the subtlety of the civil law and contrary to the dictates of natural justice, derive advantage from his own bad faith — *ne cui dolus suus per occasionem iuris civilis contra naturalem aequitatem prosit* (Dig. 44.4.1). A consideration of the many instances given in Dig. 44.4 in which this defence can be maintained, shows that the doctrine of estoppel *in pais* is merely an extended interpretation of the principle underlying the *exceptio doli mali*. The application of the maxim of Roman law, *nemo contra suum factum venire debet*, would create the same legal consequences as estoppel in English law;

it is practically the estoppel by conduct of the English law. The term “estoppel” has indeed been generally adopted in practice in South Africa as a more convenient expression for that form of defence which was known under the Roman law as the *exceptio doli mali* and the principles of the English doctrine of estoppel by conduct, as evolved by the decisions of English courts, may, I think, be equally applied in our courts in the consideration of a defence such as is raised in the present case.

This preamble is followed by a finding based on several English judgments. The reasoning in this case concerning the meaning of the *exceptio doli* is supported by two later decisions, *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) and *Philips and Another v Miller and Another* (2) 1976 (4) SA 88 (W). However, now compare the decision of the Appellate Division in *Bank of Lisbon and SA v De Ornelas* 1988 (3) SA 580 (A), namely that the *exceptio doli* did not form part of Roman-Dutch law, nor consequently of South African law. This latter decision must be regarded as the prevailing law.

The judgment in the *Waterval* case paved the way for the universal acceptance of the English doctrine of estoppel by representation to such a degree that the Appellate Division could later simply state the following in *Baumann v Thomas* 1920 AD 428: “The doctrine, however, is as much part of our law as it is of that of England.” It accepted that the English doctrine of estoppel by representation forms part of our own law. And with that the process of judicial **reception** was complete.

As remarked in *Connock’s (SA) Motor Co Ltd v Sentraal-Westelike Ko-op Mpy Bpk* 1964 (2) SA 47 (T) 49:

[T]he English doctrine of estoppel by representation migrated to this country on the authority of a passport that it approximated the *exceptio doli mali* of Roman law. However doubtful the validity of that passport might originally have been the doctrine has now become naturalised and domiciled here as part of our law.

In *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A) at 410–411, however, the question of the origin and content of the South African law of estoppel by misrepresentation came under investigation in the Appellate Division once again. In the light of the new approach to our law of estoppel, which is reflected in the judgment, and the intense interest which the judgment elicited (see 1965 SALJ 17), the following relevant *dictum* of Steyn CJ is quoted in full:

If I understand this remark correctly, the learned Judge (of the court *a quo*) is of the opinion that our law of estoppel must in the first place be sought in the decisions of English courts. If this correctly reflected his opinion, I would be obliged to disagree. It is true that in a series of decisions of this court, such as *Rossouw and Steenkamp v Dawson* 1920 AD 173 on p 181, *Baumann v Thomas* 1920 AD 428 on p 434, and *Union Government v National Bank of S.A. Ltd* 1921 AD 121 on p 127, the view has been taken that our law of estoppel is the same as that of England, and that in practice English decisions are consulted for guidance more frequently than our own authorities. However, I am not convinced that an application of the principles found in our law will in all cases lead to the same results accepted in English law, and the enquiry apparent from the mentioned cases cannot justify such a general conclusion. The view that our own authorities have for practical purposes been replaced with English cases by

these and similar decisions, with the concomitant implication that our courts, and also this court, are bound by English cases, I would reject as clearly and totally unsubstantiated. No court, not even this court, has the capacity to replace our common law with the law of another country. That can only be done by the legislature. I also cannot accept that it was the intention to accomplish something like that. If it were, I would not regard myself bound thereby, since it would be diametrically opposed to the elementary duty of each court to apply no other law than its own. It is furthermore obvious that in many decisions dealing with estoppel, reference to the foundations on which it rests in our law was not omitted. This reference was made in, amongst other cases, *Smit v Smit's Executor* (1897) 14 SC 142; *Van Blommestein v Holliday* (1904) 21 SC 11; *In re Reynolds Vehicle and Harness Factory Ltd* (1906) 23 SC 703; *United South African Association Ltd v Cohn* 1904 TS 733; *Wateroal Estate and Gold Mining Co Ltd v New Bullion Gold Mining Co Ltd* 1905 TS 717; *Morum Bros Ltd v Nepgen* 1916 CPD 392; *Pretorius v Pretorius* 1948 (4) SA 144 (0) and also in the abovementioned decisions of this court. That our own law has been jettisoned, therefore cannot be maintained; and to look for it in another legal system, even where a similarity of legal principle can be found, I cannot but regard as an ill-founded procedure. By this I do not wish in the least to imply that all reference to or consideration of the principles of another legal system is evil. Comparative consideration can, as is abundantly clear from many of our decisions and legal treatises, be a very useful tool by which to gain clarity on the best application, adaptation or development of own principles. To exclude the influence of the cross pollination between related legal systems, would not only be an impossibility but also a short-sighted impoverishment to which I would in no way wish to contribute. But it is one thing to investigate another legal system in order to better apply one's own, and something totally different to approach another legal system as though it were an incorporated part of our own legal sources. (Our translation.)

As is clear from the quotation, the Appellate Division reacted strongly against the view that our own authorities (*die outoriteite*) have been replaced by the English law of estoppel, or that, in practice, guidance should be sought primarily from English law.

However, the reaction of the Appellate Division is not justified or realistic in every respect. As has been explained, our common law, (our "own authorities") did recognise the **basic idea** of estoppel as embodied in certain defences and rules (eg *exceptio doli*, *nemo contra suum factum venire debet*, etc), but by no means knew a sophisticated doctrine based on principle and comparable to or analogous with estoppel. Therefore, to a great extent the relatively sophisticated English doctrine was "received" into our law by means of a lengthy process (De Wet Chap 2). However, this certainly does not mean that the modern South African law of estoppel is identical to the English law in principle and in every particular. Through the years our courts, bearing in mind the recognition of the principle underlying estoppel in our common law and with the aid of the detail of the English doctrine of estoppel, have developed a law of estoppel largely peculiar to South Africa. This fact is well illustrated if the requirements for estoppel in English and South African law are compared. To enable you to make this comparison throughout your studies, the English requirements are set out briefly below. If the Chief Justice meant that the courts should first turn to our own law of estoppel as developed by our courts before English

authorities are examined, one must agree with him. It will not be much use consulting our common-law authorities; there is a complete absence of developed and comprehensive doctrines or principles concerning estoppel. The value of the Appellate Division's reaction lies in the fact that our courts have been made aware of a weakness of the past, namely the tendency to accept English cases as authoritative before properly examining our own authoritative sources and sources of origin.

2.3 REQUIREMENTS OF ENGLISH LAW FOR ESTOPPEL BY REPRESENTATION

You must **read** this section carefully but need not study it for examination purposes.

In English law the party who raises estoppel by representation must prove the following (Spencer Bower 27–28):

From the statement of the governing principle of estoppel by representation which has already been propounded, it may be gathered that the following elements must concur in order to constitute a valid estoppel by representation, and that the party setting up such an estoppel must be prepared, in the proper manner and at the proper time, to establish each and every one of them, except so far as he may be relieved of this burden by the express or implied admission of his opponent:

- (a) That the alleged representation of the party sought to be estopped was such as is in law deemed a representation;
- (b) that the precise representation relied upon was in fact made;
- (c) that the representation, or case, which the party is later sought to be estopped from making, setting up, or attempting to prove, contradicts in substance his original representation, according to proper canons of construction;
- (d) that such original representation was of a nature to induce, and was made with the intention (actual or presumed) and the result of inducing the party raising the estoppel to alter his position on the faith thereof to his detriment;
- (e) that such original representation was made by the party sought to be estopped, or by some person for whose representations he is deemed in law responsible, and was made to the party setting up the estoppel, or to some person in right of whom he claims.

Pay particular attention to the fact that English law does not require intent or negligence, that is **fault**, on the part of the estoppel-denier. Authors such as Spencer Bower prefer, as far as possible, to avoid any reference to the concept of negligence in connection with estoppel.

SELF-ASSESSMENT

- (1) Briefly describe how the reception of the English law of estoppel into South African law took place.

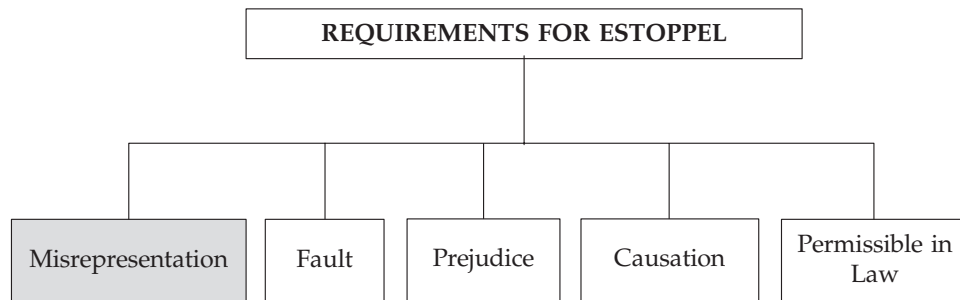
- (2) Are South African courts bound by the decisions of the English courts concerning the law of estoppel? Explain.
- (3) Critically discuss Steyn CJ's opinion in *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A) concerning the authority of English case law on the law of estoppel for South African courts.

FEEDBACK

- (1) See 2.2. Remember that for a proper and thorough grasp of estoppel in our modern law, you need to **read** the historical development of estoppel in English law and **study** its reception into South African law. The fact that estoppel originated from English law (ie a common law legal system) inevitably meant that it was not entirely compatible with the South African civil law heritage. However, estoppel eventually developed its own South African flavour and without it our law would be much the poorer.
- (2) See 2.2. Consider the implications if the English law of estoppel had to be strictly adhered to in a South African context. Among other things it would mean that every development peculiar to the English law would have to be applied in South African law. Remember that while English law has had a profound influence on South African law, it has not replaced Roman-Dutch law. Also bear in mind differences between the English concept of estoppel (see 2.3) and the concept as it has evolved in the modern South African law (refer to 1.2.1 in study unit 1).
- (3) See 2.2. Note that the answer to this question overlaps with the previous one. Have you considered whether a compromise approach to the issue of (the influence of) English law is more feasible than an extreme one? You will also note from studying the study guide that a fairly comprehensive body of South African case law has developed on estoppel and that it rarely happens that a court looks for guidance in English law to resolve some estoppel-related issue. Nevertheless, English law provides a convenient and useful point of reference.

REQUIREMENTS FOR A SUCCESSFUL RELIANCE ON ESTOPPEL: INTRODUCTION; MISREPRESENTATION

Study units 3 to 7 deal with a very important part of the study material, namely the requirements for estoppel. These study units form a whole and are interrelated. The following diagram will be used in conjunction with the discussion of the requirements for estoppel in study units 3 to 7 to provide you with an overview of the contents and a perspective on the role of the requirements in the bigger picture.



OVERVIEW

Successful reliance on estoppel requires that certain conditions or elements must be proved. This study unit and the four study units that follow it (ie study units 3–7) deal with these requirements. In this study unit deals with the first requirement, namely that there must be a misrepresentation.

PRACTICAL SCENARIOS

These examples provide practical scenarios that will be relevant in the discussion and questions in this study unit. You will find this feature throughout your study guide. Think about these scenarios but do not try to answer them in full now. Keep them in the back of your mind while reading through your prescribed material and the study guide. The examples will clarify the abstract concepts discussed here and the answers may become self-evident as you work through the material.

Scenario 1

1 A, the owner of a cow which had previously disappeared, recognised the

Scenario 2

- cow at an auction but failed to say anything when it was sold to B. Can A be prevented from claiming the cow with the *rei vindicatio*?
- 2 C entrusts his car to D for safekeeping and D proceeds to sell the car to E. Will E be able to plead estoppel successfully when C claims his car with the *rei vindicatio*?

SELF-EVALUATION GOALS

After completing this study unit you should be able to

- state the requirements for a successful reliance on estoppel
- explain what is meant by a representation and illustrate the explanation with examples
- explain what is meant by a misrepresentation
- explain the criterion used to determine whether a representation reflects an untruth and apply this criterion
- explain under what circumstances an omission constitutes a misrepresentation and illustrate the explanation with examples
- explain under what circumstances an owner makes a misrepresentation by leaving his or her thing in the possession of another person and illustrate the explanation with examples
- explain to whom the misrepresentation must be made in order to invoke estoppel

PRESCRIBED CASE LAW

Electrolux (Pty) Ltd v Khota 1961 (4) SA 244 (W)

ADDITIONAL READING MATERIAL (OPTIONAL)

- Rabie *LAWSA* par 656–660
Rabie & Sonnekus 47–97
Visser & Potgieter 61–116
Van Huyssteen & Van der Merwe “Estoppel by representation: The ambiguity of an ‘unambiguous representation?’” 1990 *TSAR* 86
Van der Merwe “Estoppel as gevolg van ‘n late en die sogenaamde plig om te spreek” 1964 *THRHR* 57
Connock’s (SA) Motor Co Ltd v Sentraal-Westelike Ko-operatiewe Maatskappy Bpk 1964 (2) SA 47 (T)
Oakland Nominees v Gelia Mining and Investment Co (Pty) Ltd 1976 (1) SA 441 (A) 452
Akojee v Sibanyoni 1976 (3) SA 440 (W)
Grosvenor Motors (Potchefstroom) Ltd v Douglas 1956 (3) SA 420 (A)
Fellner v Dönges 1953 (3) SA 517 (T)
Universal Stores Ltd v OK Bazaars (1929) Ltd 1973 (4) SA 747 (A)
Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd 1981 (3) SA 274 (A)
B & B Hardware Distributors (Pty) Ltd v Administrator, Cape 1989 (1) SA 957 (A)
Van Rooyen v Minister van Openbare Werke & Gemeenskapsbou 1978 (2) SA 835 (A)

Poort Sugar Planters (Pty) Ltd v Minister of Lands 1963 (3) SA 352 (A)
Hauptfleisch v Caledon Divisional Council 1963 (4) SA 53 (C)
Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd 1963 (1) SA 632 (A)

3.1 INTRODUCTION

The requirements for a successful reliance on estoppel are discussed with reference to decided cases.

As we have already stated, the effect of the doctrine of estoppel is that when a person has led another to believe that a certain state of affairs exists and the other person acts to his or her detriment on this belief, the relationship between them is adjudged as if the misrepresentation were true. In certain instances it is also required that the false belief must have been created intentionally or negligently. The requirements for estoppel are therefore the following:

- (1) The creation of a false belief or impression (misconception) by the person against whom estoppel is pleaded. (We refer to such a person as the **estoppel-denier**.) Therefore there must be a misrepresentation.
- (2) Fault (intention or negligence) on the part of the estoppel-denier. (Fault is required only in certain instances.)
- (3) Prejudice on the part of the person invoking estoppel (to whom we shall refer as the **estoppel-asserter**).
- (4) Causation: the prejudice must be caused by the fact that the person who has been misled has acted on the strength of the misrepresentation.
- (5) The law must allow estoppel to be raised in the particular case.

3.2 MISREPRESENTATION

Since the doctrine of estoppel applies in circumstances where a false impression is created or a misrepresentation is made, it is obvious that the first requirement for the application of the doctrine is that a **representation** is made which in the circumstances must be a **misrepresentation**. Firstly there must be a representation and, secondly, this representation must create a false impression. These two aspects of this requirement are usually contained in one idea or concept, namely misrepresentation. To maintain a clear understanding, however, it is advisable always to bear in mind the dual nature of this requirement. The two parts of this requirement can respectively be compared with the similar requirements for delictual liability, with which you are already familiar, namely the act and wrongfulness.

3.2.1 Representation

The first requirement for a successful plea of estoppel consists **firstly** of a representation created by the conduct of the one party (the estoppel-denier). Any word or conduct which may create an impression is a representation. Any

medium suitable for the expression or communication of thoughts, be it words or conduct, or even silence, may give rise to a representation.

representation of fact

It is generally accepted that the representation must deal with a factual issue. In LAWSA paragraph 657, this matter is explained as follows:

657 Representation must be one of fact “It has been stated as a rule in several cases, following English decisions, that to found an estoppel by representation, the representation must be one of an existing fact and not one of intention or future intention. It follows that a mere expression of opinion cannot form the basis of an estoppel. A representation as to a person’s state of mind has been held to be a statement of fact and therefore capable of sustaining a plea of estoppel, even when it relates to his or her conduct in the future. Thus, where a defence of estoppel was raised against a landlord who sought to eject a tenant for late payment of rent after it had over a long period accepted late payments without protest, it was unsuccessfully contended that there could be no estoppel because there had been no representation of an existing fact, but at most a tacit representation as to future conduct. The court held that the landlord’s long-continued receipt, without protest, of late payments of rent constituted a representation as to its state of mind with regard to such payments and that it had induced in the tenant the belief that it would not, without prior warning, insist on punctual payment of rent in future. A representation of law cannot found an estoppel. The reason for the rule is that it is reasonable to suppose that each party is in as good a position as the other to satisfy him or herself as to what the law is. A statement involving a conclusion of law can, however, be made in such a way that it amounts to a statement of fact. A representation of mixed fact and law, it has been held in England, is capable of founding an estoppel. A statement by one contracting party to another to the effect that he puts a certain construction on a clause in their contract and that he will abide by that construction, is a statement of fact, not of law, and the party who made it may be precluded by the *exceptio doli* from denying the correctness in law of his or her construction if the other party was induced to enter into the contract by that construction.”

As has been pointed out, any word or conduct may constitute a representation (estoppel by conduct).

example

Q sues W for payment for services rendered at a dance. W denies that S, his employee, was authorised to negotiate on his behalf — Q raises estoppel. The defence is upheld when it becomes apparent that S has previously negotiated thus on a similar occasion. By accepting the services W has created the impression that he agrees that S should act on his behalf. (See also *Quin and Co Ltd v Witwatersrand Military Institute* 1953 (1) SA 155 (T).)

example

The *same* applies when for some time a lessor has consistently accepted the late payment of rent without objecting and without making use of a *lex commissoria* (right to resile) in the lease; he or she will not be allowed to cite a further late payment as a ground for the cancellation of the lease without warning the lessee in advance. Through his or her actions in the past he or she has created the impression that he or she will not resile from the contract on the ground of late payment. (See *Garlick Ltd v Philips* 1949 (1) SA 121 (A); *Meyerson v Osmond Ltd* 1950 (1) SA 714 (A); *Naicker v Pensil* 1967 (1) SA 198 (N).)

Where a person implies that he or she agrees to one of two mutually exclusive alternatives, he or she creates the impression that he or she has abandoned the other (estoppel by election).

example

In *Bacon v SAR and H* 1925 CPD 261 the plaintiff claimed R170 for a lost trunk. She was offered R60 without prejudice. Before payment, the trunk was found and returned to her. She claimed the R60 nonetheless. The court held that she was estopped, because by accepting the trunk she created the impression that she had waived her claim for the R60.

(See *Collen v AA Mutual Insurance Association Ltd* 1954 (3) SA 625 (E) and *Singh v Protea Assurance Co* 1982 (2) SA 237 (D).)

3.2.2 Misrepresentation

The mere fact that the estoppel-denier makes a representation which is construed by the estoppel-asserter in a particular way is still not sufficient for the purposes of successful reliance on estoppel. The representation must **secondly** be a **misrepresentation**. A representation which reflects the truth but is misunderstood by the estoppel-asserter is not a misrepresentation. If I clearly say “yes” when I mean “yes” and the estoppel-asserter understands “no”, he or she will not be able to plead estoppel, since I have made no misrepresentation whatsoever, even if, strictly speaking, I have created a false belief.

It is normally not difficult to discover whether a representation is a misrepresentation or not. **Any word or conduct which communicates an untruth is a misrepresentation.** (Note that the question is not how the conduct is subjectively understood by the estoppel-asserter, since he or she may even mistake the truth for an untruth; the question is whether in fact the conduct reasonably reflects an untruth.) However, sometimes it is not easy to determine whether a representation is a misrepresentation or not, and here we must revert to the criterion of the legal views held by the community (the *boni mores*) in order to determine whether the representation is a misrepresentation or not.

A representation which, in accordance with the legal views of the community, reflects an untruth, amounts to a misrepresentation. A representation which does not reflect an untruth in accordance with the legal views of the community is therefore not a misrepresentation. The question whether a representation indeed constitutes a misrepresentation is therefore determined with reference to the general criterion for wrongfulness. Our courts, however, seldom formulate this criterion with direct reference to wrongfulness or the *boni mores*. Instead, the misrepresentation is tested against certain stereotyped further “requirements”. For example, the misrepresentation “must have been intended to be acted upon in the manner in which the representee acted”; or that it “must have been such as to lead a reasonable man to believe that it was meant to be acted upon in that manner” (*Hauptfleisch v Caledon Divisional Council* 1964 (4) SA 53 (K) 57; *Electrolux (Pty) Ltd v Khota* 1961 (4) SA 244 (W) 246); the misrepresentation must be of such a nature “as could reasonably be expected to mislead” (*Monzali v Smith* 1929 AD 282 286); or it must be “material” or “precise and unambiguous” (*Hartogh v National Bank* 1907 TS 1092 1104; *Low v Bouverie* (1891) 3 Ch 82 106; see also *Spencer Bower* 92 97 *et seq*). However, all these “requirements” merely concretise the question whether the relevant representations can be designated misrepresentations in the circumstances in

accordance with the criterion of objective reasonableness. This is already evident from the use of the words “reasonably expected to mislead”, “lead a reasonable man to believe”, “unambiguous” and so on.

Note, however, that the objectivity of the criterion implies that the reasonableness of the conduct **must be determined in the light of all the circumstances, including** the position of the deceiver (the estoppel-denier) and the deceived (the estoppel-asserter). Hence the references to the (deceiver’s) **intention to be acted upon** and the **reasonable man’s** (the deceived) reaction to or judgment of the representation. The following serves as illustration:

In *Connock’s (SA) Motor Co Ltd v Sentraal-Westelike Koöperatiewe Maatskappy Bpk* 1964 (2) SA 47 (T), “representation” is defined as “not only a representation by words or conduct made intentionally but also a representation by words or conduct made unintentionally or resulting from negligence or omission which a reasonable man would have assumed was intended to be or would have acted upon”. It has been said that this statement could give rise to confusion; that it is not quite clear whether the court is dealing with the requirement that a human act must be present, which in the case of estoppel includes the element of unlawfulness, since the act concerned is a **misrepresentation**, or whether it is dealing with the requirement of fault. Has the reference to the reasonable person to do with the first or the second element?

That the court is here concerned with the first element, namely the question of wrongfulness, appears from the fact that it is stated “that the reasonable man postulated by our law in estoppel based on unintentional conduct must have regard not only to the representee’s but also the representor’s circumstances”. In such a case it remains a question that needs to be solved in accordance with the legal views of the community, that is objective reasonableness in the light of all the surrounding circumstances. If the question of fault had been relevant here, the question should have been what the reasonable person **in the position of the deceiver** would have foreseen and whether the deceiver himself or herself in the light of this would have displayed the care demanded of the reasonable person in his or her position (cf the discussion of the requirement of fault in study unit 4 of this study guide).

NOTE: With reference to what has just been said you must bear in mind, when studying the further requirements for estoppel (especially fault and causation) that, like wrongfulness, these two elements are also often implied in some of the stereotyped “requirements” utilised by our courts, which were referred to above in connection with the question of wrongfulness.

Although, as explained above, these “requirements” usually function as concretisations of the criterion for wrongfulness (the objective reasonableness), it is possible that some of these “requirements” can refer in the particular circumstances of a specific case to causation or fault. Van Huyssteen and Van der Merwe (1990 *TSAR* 89) explain this as follows with reference to the requirement that the representation must be unambiguous:

The ambiguity of a representation may (also) bear upon the existence of a factual causal nexus in so far as a conclusion that the representee was in fact induced by the representation to act to his detriment will normally be supported by the fact that the false representation was clearly unambiguous. This would simply be part of the ordinary process of reasoning by the court.

The ambiguity of the representation may furthermore be one of the facts from which fault — particularly in the form of negligence — is inferred or construed. If a representation is unambiguous and a reasonable man in the position of the representor (“die misleier”) would have foreseen that it was false and potentially prejudicial, he would most probably have taken steps to guard against prejudice to the representee (“die misleide”). If the representation is ambiguous, a reasonable man may still have foreseen and guarded against prejudice, but probably to a lesser extent.

This reasoning process applies to all the “requirements” explained above. “(I)ntended to be acted upon”, for example, can obviously also refer to fault in the form of intent, and “reasonably expected to mislead” can refer to the fact that the reasonable person in the position of the deceiver would have foreseen and prevented damage — that is to fault in the form of *culpa* (negligence).

3.2.3 Misrepresentation by an omission (*omissio*)

It has already been shown that it is not only an express statement or positive act creating a false impression which can give rise to estoppel; a silence or omission (*omissio*) can also constitute a misrepresentation. An omission constitutes a misrepresentation only if a **legal duty** rests on the estoppel-denier to act positively; an omission in the form of the nonfulfilment of a legal duty to act (or to speak) is therefore a misrepresentation which can give rise to a successful plea of estoppel (see Spencer Bower 48 *et seq*).

In English law the duty to act positively is referred to as the “duty to act or speak”. There is no unanimity in our law about the question whether the existence of such a duty is a requirement for the existence of a misrepresentation by *omissio* and therefore for a plea of estoppel (see De Wet 45–54; Van der Merwe 1964 *THRHR* 57–60). De Wet holds the view that (except in the form of a “duty to take care”, which is a criterion for fault in the form of negligence) it plays no part in the creation of or failure to rectify a misconception. He explains as follows (45–46):

By his silence a person can either create reliance or trust or omit to remove an existing reliance or trust. A duty to speak can play a part in the first case, but even a putative duty is sufficient. The regulations of a society of which I am a member, require the secretary to give each member notice of every meeting. I am under the impression that there must be a meeting on the first Saturday. The secretary omits to send me a notice. Because of his silence I am under the impression that there will be no meeting. I would have experienced the same reliance on the secretary if I had erroneously assumed that he had a duty to give me notice, if in fact he had no such duty. In the second case, that is, omitting to dispel this reliance, one is dealing with a pure omission — non-interference with the course of events. The cork drifts down the stream, if I do not remove it from the water, it is washed away; the man thinks I am a partner, if I do not tell him that I am not a partner he remains under that impression. My duty has no impact on the factual course of events. The duty to speak therefore does not form part of the creation or nonremoval of the reliance. (Our translation.)

De Wet is correct in saying that the existence or non-existence of a duty has no effect on the “factual course of events”. One can in fact create or fail to rectify a

mistaken impression without the existence of such a duty. However, the question remains whether the impression has been created by a misrepresentation contrary to a legal duty, that is which is objectively unreasonable and thus wrongful. To establish this (and not to determine the **factual course of events**) it is necessary to make use of the concept of the **duty to speak**. If the impression is created by a representation in the form of an omission, the omission will be wrongful if there is a legal duty to act positively, in other words, if the impression was created contrary to a legal duty. Only when it has been established that the existing impression which has been created was brought about by means of a misrepresentation (*per omissionem*), can estoppel possibly enter into the picture. In broad outline this is also Van der Merwe's viewpoint.

When is there a duty to speak? It is clear that a person does not have a general duty to rectify existing misconceptions (*Parsons v Langemann* 1948 (4) SA 258 (C); *Fellner v Dönges* NO 1953 (3) SA 517 (T); *Pretorius v Natal South Sea Investment Trust Ltd* 1965 (3) SA 410 (W); *Kruger v Pizzicanella* 1966 (1) SA 450 (C)). A person may have a legal duty in specific circumstances. This will happen when the *boni mores*, the legal views of the community as a whole, require that such a duty to act positively should exist. In accordance with the abovementioned criterion, such a duty will exist in certain circumstances where the estoppel-denier can **reasonably** be expected to act positively.

example

A few examples from our cases: in *Maling v Hargreaves* 25 SC 123, the owner of a cow which had disappeared five years before, recognised the cow at an auction, but allowed it to be sold (an *omissio*, therefore). The defendant successfully raised a plea of estoppel against his *rei vindicatio*. In *Beckett and Co v Gundelfinger* 4 OR 77, the lessee of land made no protest when it was described as free of any lease at an auction. He was also estopped from subsequently pleading that the land had been sold subject to the lease (see *Hills' Executor v Jones* 19 SC 235).

If the community does not view it as unreasonable to remain silent in the circumstances, the estoppel-denier's voluntary omission, although still an act, will not be wrongful. Here we are therefore concerned with the act and wrongfulness which must be determined with reference to objective reasonableness or the *boni mores*.

This matter is summarised as follows in *LAWSA* paragraph 656:

Generally speaking, and depending on the relationship between the parties involved, the duty to speak or act arises if it is considered reasonable in the circumstances that the person concerned should speak or act in order to avoid the other person's acting to his detriment. The test as to when the duty arises would seem to correspond with the test applied in the case of a delictual omission.

3.2.4 Misrepresentation where an owner entrusts his or her property to the possession of another

The question whether there could reasonably be misrepresentation often arises where an owner entrusts his or her property to the possession of another. Does he or she imply that the possessor only has possession (which reflects the truth) or does he or she imply that the possessor is the owner and therefore has a right

to dispose of the property (which reflects an untruth)? This question has arisen repeatedly in our courts.

example

Compare for example *Adams v Mocke* 23 SC 722: A, a postal transport contractor, authorised his driver to hire post horses and mules in case his horses should become disabled on the road — which in fact happened. The driver hired a mule from E and left the lame horse with E on the understanding that E would look after and, if need be, use the horse until the hired mule could be returned. E, however, sold and delivered the horse entrusted to him to a certain Mocke. In the ensuing action A claimed the horse from Mocke and succeeded in his claim. Lord de Villiers observed that

... an owner does not lose his right of vindication unless he had so entrusted his goods under circumstances which might fairly and reasonably induce third parties to believe that the ostensible owner was the true owner or had authority from the true owner to dispose of the goods. In the present case no such circumstances have been proved to exist. The fact that the plaintiff entrusted the postcart horses to his driver could lead no one reasonably to believe that he had the right to sell or exchange horses.

example

In *Morum Bros Ltd v Nepgen* 1916 CPD 392, the facts were the following: A sold two horses to S, a speculator in horses, a postal contractor and also a vendor of fish and vegetables. The sale was subject to a suspensive condition that, despite delivery of the horses, ownership of them would not pass before the purchase price had been paid. After the horses had been delivered to him but before he had paid the purchase price, S sold them to a *bona fide* purchaser. A thereupon instituted the *rei vindicatio* against the second purchaser, who invoked the doctrine of estoppel, contending that A, the owner, had placed S in a position to represent himself as the owner of the horses. The court rejected this contention and ordered the defendant to return the horses to A.

Since the separation of ownership from possession occurs so frequently, it would be unreasonable and contrary to the legal views of the community, as interpreted by the courts, to accept without further investigation that the possessor of a horse is its owner. The representation is a misrepresentation if the message it gives a reasonable person is false.

However, if the owner goes further and not only tolerates the possession of his or her property by another, but also gives him or her the title documents or a blank transfer form or something similar, his or her representation may in fact amount to a misrepresentation, since his or her conduct may be reasonably conducive to the false conclusion that the possessor is the owner.

example

The case of *Fawdon v Lelyfeld* 1937 TPD 339 can serve as illustration. The owner of a racehorse hired it out to B and L. To evade the jockey club regulations the lease was drawn up in the guise of a contract of sale. B and L received a false receipt for the fictitious sum of R200 to enable them to act as owners in their dealings with the jockey club. B and L subsequently sold the horse to Mrs Lelyfeld. The defendant, Mrs Lelyfeld, pleaded estoppel against the *rei vindicatio* of the owner and succeeded in her plea. In this case the owner of the horse had placed B and L in a position to represent themselves

to Mrs Lelyfeld as the owners of the horse. It was not the mere possession of the horse by B and L, but the possession together with the fictitious receipt, that had created an impression of such a nature that it could reasonably mislead third parties. (See also *Grosvenor Motors v Douglas* 1956 (3) SA 420 (A) below.)

In *Electrolux (Pty) Ltd v Khota* 1961 (4) SA 244 (W) this matter is explained as follows:

I think that generally and logically the first enquiry should be into what was the specific conduct of the owner that the respondent relies upon for the estoppel. If that conduct is not such as would in the eyes of a reasonable person, in the same position as the respondent, constitute a representation that the swindler was the owner of, or entitled to dispose of, the articles, then *cadit quaestio* — no estoppel could then arise. But if such conduct does beget that representation, then the next enquiry would logically be whether the respondent relied upon, or was misled by, that representation in buying the articles.

[T]he owner's mere entrusting a person (not being a factor, broker, or agent for selling) with the possession of its articles is not sufficient to produce the representation that the *dominium* or *ius disponendi* was vested in the possessor. The respondent would not be entitled to assume from such mere possession that the possessor was authorised to dispose of the articles. If he made such an assumption he would only have himself to blame for his gullibility. To give rise to the representation of *dominium* or *ius disponendi*, the owner's conduct must be not only the entrusting of possession to the possessor but also the entrusting of it with the *indicia* of the *dominium* or *ius disponendi*.

example

Such *indicia* may be the documents of title and/or of authority to dispose of the articles, as for example the share certificate with a blank transfer form annexed, as in *West v De Villiers* 1938 CPD 96; or such *indicia* may be the actual manner or circumstances in which the owner allows the possessor to possess the articles, as for example the owner-wholesaler allowing the retailer to exhibit the articles in question for sale with his other stock in trade. (See also *OK Bazaars (1929) Ltd v Universal Stores Ltd* 1973 (2) SA 281 (C) at 288 D.)

3.2.5 The person to whom the misrepresentation must be made

The misrepresentation must be made to the person pleading estoppel (the estoppel-asserter).

A person can rely on a representation as founding an estoppel only if it was made to him, a representation made to someone else being *res inter alios acta* [generally that acts of third parties do not prejudice the parties]. However, this does not mean that the person raising the estoppel must establish that the representor made the representation to him personally, or alone, for it may be sufficient, depending on the facts of the case, to show that the representation was made to the public of which the person

misled is a member (*LAWSA* par 660; See also *Fellner v Dönges* 1953 (2) SA 517 (T)).

SELF-ASSESSMENT

- (1) What are the requirements for a successful reliance on estoppel?
- (2) What is meant by a “representation”? Explain and elucidate your answer with examples.
- (3) What is meant by a “misrepresentation”? Explain.
- (4) What criterion is used to determine whether a representation reflects an untruth? Discuss.
- (5) Under what circumstances will an omission constitute a misrepresentation? Explain and elucidate your answer with examples.
- (6) Under what circumstances does an owner make a misrepresentation by leaving his or her thing in the possession of another person? Discuss in detail, citing examples from case law.
- (7) The light meter of John’s camera malfunctions. John takes his camera to a camera dealer for repairs. After the technician has repaired the camera, he absent-mindedly leaves it among second-hand cameras offered for sale. Peter buys the camera from the store. When John discovers this, he claims the camera from Peter. Peter, raising estoppel, says that John has made a misrepresentation that the camera was for sale. Advise John on the merits of Peter’s defence.
- (8) To whom must the misrepresentation be made in cases of estoppel?

FEEDBACK

- (1) See 3.1. All the requirements for estoppel should be kept in mind while you are studying each separate element. Also bear in mind that some of these elements are required strictly (eg misrepresentation) while others are not (eg fault).
- (2) See 3.2.1. Compare the concept of a representation with the delictual element of an act. You will notice that a representation is but a specific example of an act. In this way your understanding of the law of delict will benefit you in your study of estoppel.
- (3) See 3.2.2. Compare the concept of a misrepresentation with the delictual elements of act and wrongfulness.
- (4) See 3.2.2. Have you considered whether there is any difference between the test for wrongfulness in the law of delict and the test to determine whether a representation reflects an untruth? Pay careful attention the courts’ expression of this requirement in the context of estoppel.
- (5) See 3.2.3. The question of misrepresentation by omission is a tricky one and much will depend on the particular circumstances of a case. Pay

careful attention to the examples from case law. Try to determine why the court allowed the plea of estoppel to succeed in a particular instance.

- (6) See 3.2.4. This is a very important aspect of this part of the study material since it deals with a situation which often seems to occur. Bear in mind that the requirement of fault also tends to feature prominently in such circumstances, so refer to this section again once you have completed study unit 4.
- (7) See 3.2.4. Note that this question and the previous question relate to the same study material. In the circumstances it cannot be said that John, merely by leaving his camera with the camera dealer, had created the impression that the dealer had *dominium* or *ius disponendi* in respect of the camera (see *Electrolux (Pty) Ltd v Khota* 1961 (4) SA 244 (W) above). Try to think of further examples where estoppel might succeed in such circumstances and be mindful of the fact that fault features prominently as a requirement.
- (8) See 3.2.5. This aspect is fairly straightforward.

FEEDBACK: PRACTICAL SCENARIOS

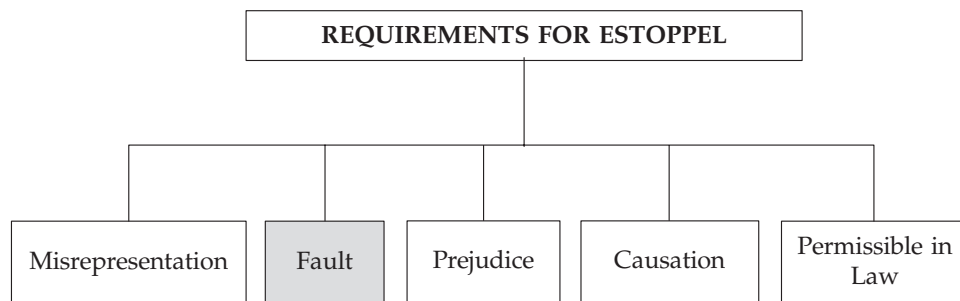
Scenario 1

Scenario 1 is based on the facts of *Maling v Hargreaves* 25 SC 123 discussed in paragraph 3.2.3 above and provides an apt illustration of circumstances in which the estoppel-denier could reasonably have been expected to act positively and speak. Bear in mind that such instances are the exception rather than the rule. Try to think of more examples.

Scenario 2

Scenario 2 deals with the question whether the mere leaving of one's article with another creates the impression that the other party has the *dominium* or *ius disponendi* in respect of the article. Generally, the answer is in the negative. See the feedback and paragraph 3.2.4 above in this regard. Can you think of an exception where the mere entrusting of one's article to another may create the impression that the other party has the *dominium* or *ius disponendi* in respect of the article? See paragraph 4.3.2 in study unit 4 below.

REQUIREMENTS FOR A SUCCESSFUL RELIANCE ON ESTOPPEL: FAULT



OVERVIEW

In the previous study unit we dealt with the first requirement for a successful reliance on estoppel, namely that there must be a misrepresentation. In this study unit we deal with a second requirement which is fairly contentious but only seems to be required in certain cases, namely fault.

PRACTICAL SCENARIOS

Scenario 1

1 The owner of a building finds a purchaser for the building, but the prospective purchaser refuses to buy it while it is still being leased. The lessee, thinking that his lease is due to expire on a particular day, writes a letter to the owner expressing his intention of vacating the property by a certain date. The owner shows the letter to the prospective purchaser who, on the strength of it, concludes the purchase. The lessee discovers that he has made a mistake and notifies the new owner. The owner applies for his eviction. Will the lessee be able to rely on the terms of the lease to prevent his eviction?

Scenario 2

2 A leaves his car for repairs with B, who services cars in his back yard and also sells old cars from the premises. A forgets the original registration papers of the car in it when he leaves it with B. B repairs the car but leaves it standing next to old cars which are for sale. C shows an interest in buying the car and B's wife, upon finding the registration papers in the car, assumes that it is for sale and sells it to C. Will C be able to plead estoppel successfully when A claims his car with the *rei vindicatio*?

SELF-EVALUATION GOALS

After completing this study unit you should be able to

- discuss in detail the question whether fault is required for a successful reliance on estoppel, referring to:
 - intent as well as negligence
 - cases dealing with the *rei vindicatio* and cases where the *rei vindicatio* is irrelevant
 - possible exceptions
 - case law
- formulate the test for negligence in cases of estoppel and apply it
- explain what the position is if there is fault on the part of the misled person

PRESCRIBED CASE LAW

Grosvenor Motors (Potchefstroom) Ltd v Douglas 1956 (3) SA 420 (A)
Johaadien v Stanley Porter (Paarl) (Pty) Ltd 1970 (1) SA 394 (A)
Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd 1976 (1) SA 441 (A)
Sunday v Surrey Estate Modern Meat Market (Pty) Ltd 1983 (2) SA 521 (C)
Akojee v Sibanyoni 1976 (3) SA 440 (W)

ADDITIONAL READING MATERIAL (OPTIONAL)

Rabie LAWSA par 666–671
Rabie & Sonnekus 133–165
Visser & Potgieter 211–303
Lewis “Aspects of estoppel as a defence to the *rei vindicatio*” 1986 SALJ 69
Blecher “Negligence, estoppel and the *rei vindicatio*” 1977 SALJ 1
Kerr “Estoppel and the *rei vindicatio*: brokers, factors and agents for sale” 1977 SALJ 260
Amicus curiae: “The vindicatory action and its limitations” 1977 SALJ 256
Sonnekus “*Akojee v Sibanyoni*” 1977 TSAR 176(6)
Van der Walt & Pretorius “Verkoping deur ’n verkoopsagent- en faktoer as verweer teen die *rei vindicatio*” 1989 TSAR 625
Van der Walt “Die beskerming van die *bona fide*-besitsverkryger: ’n vergelyking tussen die SA en Nederlandse reg” *J C Noster Gedenkbundel* 73
Trust Bank van Afrika Bpk v Van der Walt 1962 (1) SA 174 (T)
Pretorius v Loudon 1985 (3) SA 838 (A)
Monzali v Smith 1929 AD 382
Coetzee v Van der Westhuizen 1958 (3) SA 847 (T)
Trust Bank of South Africa Ltd v Maharaj 1961 (2) SA 770 (N)

4.1 INTRODUCTION: INTENT AND NEGLIGENCE

Intent and negligence

Fault as a requirement for estoppel, as in the law of delict, can take the form of either intention or negligence. Although it is obviously a sufficient form of fault for estoppel, it is clear that intent (*dolus*) is not required for a successful plea of

estoppel. However, before we can deal with whether negligence (*culpa*) is always a requirement for a successful plea of estoppel, a short explanation of what the requirement for negligence entails would be useful.

- test for negligence The negligence requirement for estoppel, just as in the law of delict, can be formulated as follows: If a reasonable person in the position of the deceiver (estoppel-denier) would have foreseen loss or prejudice to the deceived (estoppel-asserter) and would have taken steps to prevent the loss, and if the deceiver either did not foresee loss or did not take the necessary steps to prevent it, the deceiver is negligent. This test implies, with specific reference to estoppel, that the reasonable person must not only have foreseen that the deceived would react to his or her detriment to the (mis)representation (ie that he or she would be misled by the deception and would react to it to his or her detriment), but also that the reasonable person must actually have been aware (or should reasonably have been aware) that the representation reflected an untruth (ie was a misrepresentation). After all, reasonable person cannot be expected to take steps to prevent loss resulting from a true or accurate representation of facts.
- English law To this day in English law it is still uncertain whether fault in the form of negligence is required. Some of the requirements of English law (see study unit 2) may perhaps be indicative of a requirement of fault, but the requirement is not laid down *eo nomine*. In particular, the requirement that the misrepresentation must have been material can in practice be tantamount to a requirement of fault (see Spencer Bower 91–92). It is significant, however, that in his discussion of the requirements for estoppel in English law, Spencer Bower does not, in principle, list fault as one of the requirements. De Wet 38–41 is of the opinion that English law does in fact require fault.
- South African law As far as the general position in South African law is concerned, the following remarks in *LAWSA* paragraph 666 are instructive:
- It is clear law that *dolus* is not an essential element of estoppel. It is therefore not necessary to show that the person against whom estoppel is invoked acted with the intention to deceive. As to the question whether fault in the form of *culpa*, or negligence, is a prerequisite to the operation of estoppel, the law would appear not to be wholly settled, and it would seem that there is no simple answer to the question that would hold good in all situations and in all types of cases. In *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) decided by the appellate division in 1970, the chief justice, with whose judgement three other members of the court agreed, held that it is necessary, save possibly in certain exceptional circumstances, to prove negligence on the part of the person whom it is sought to estop from vindicating his property, but he went on to say that it does not follow that the law will require proof of negligence in all cases of estoppel. The decisions of the courts, both in England and South Africa, he said, do not justify the view that estoppel has a uniform pattern which is applicable in all circumstances nor that there ought to be such a pattern. Distinctions are drawn, he said, and not without reason, since there is room for differentiation in accordance with the principles and requirements of fairness governing different kinds of situations, and there would, therefore, be nothing incongruous in making *culpa* a requirement of estoppel in cases of *rei vindicatio*, even though it might not be a general requirement of estoppel. The fifth member of the court was of the opinion that a requirement of negligence in the circumstances of the case before the court would place a heavier burden on the defendant than was demanded

by the old authorities, and that it would, also, be in conflict with the interests of commerce. He expressed the view that estoppel could be invoked if an owner, in addition to giving up possession of his property to someone else (eg a borrower), performed some other act which, together with the giving up of possession, could create the impression that the possessor was entitled to sell the property on behalf of the owner, and if a reasonable man would have foreseen that the additional act could create an impression that might induce a reasonable prospective purchaser to buy.

4.2 THE NEGLIGENCE REQUIREMENT IN SOUTH AFRICAN CASE LAW

In general the earliest cases seem to require negligence for the application of estoppel. As far back as 1864 there was a case where, because of the absence of *culpa*, a person escaped liability where he would otherwise have had to pay (*Preuss v Seligmann & Prins* (1864) 1 Roscoe 198). Here a certain P signed, in ink, a receipt which had been drawn up in pencil. Thereafter the pencil writing was erased and a promissory note and acknowledgment of debt were inserted above P's signature. In the subsequent action Cloete J held, inter alia: "If by means of any gross carelessness or neglect in drawing out such a note or bill of exchange an opportunity for the committal of a fraud was afforded, in such case the maker was liable to the full amount of the note or bill when it passed into the hands of a *bona fide* holder before maturity." In this particular case the court found that P had not been negligent, and accordingly was not liable (see also *Silver v Shapiro* 1926 TPD 141).

The requirement of *culpa* (negligence) was just as clearly enunciated in *Riddelsdell v Williams* 1874 Buch 11, where the owner of a building found a purchaser for the building, but the prospective purchaser refused to buy it while it was still being leased. The lessee, thinking that his lease was due to expire on a particular day, wrote a letter to the owner expressing his intention of vacating the property by a certain date. The letter was shown by the owner to the prospective purchaser who, on the strength of it, concluded the purchase. The lessee discovered that he had made a mistake and notified the new owner of the fact. The owner applied for his eviction. The court found that the lessee was not entitled to rely on the lease: "Defendant had been guilty of culpable negligence in not ascertaining the terms of his lease before signing the letter."

The judgment in *Muller v Chennels* 1923 NPD 69, also proves to be most illuminating. Here a man gave a power of attorney to someone to sell a number of cattle. The purchaser was aware of this power of attorney and also knew how many cattle had been mentioned. However, the agent led the purchaser to believe that he had been given verbal authority to sell more. He delivered the cattle and received the purchase price. The mandator repudiated the contract in so far as it exceeded the agent's authority and claimed the cattle. The purchaser pleaded estoppel and the court, per Tatham J, held:

If estoppel is going to be raised against anybody, I should have thought it might be raised against the defendant. There has been no negligence, that I can discover, on the part of the plaintiff, but there has been most astonishing indiscretion amounting to negligence on the part of the defendant.

The last two cases, however, concerned instances where estoppel was raised as a defence against the *rei vindicatio* of the owner.

*Grosvenor Motors
(Potchefstroom) Ltd v
Douglas*

On more than one occasion our Appeal Court has required *culpa* on the part of the estoppel-denier as an essential element for a successful plea of estoppel raised as a defence against the *rei vindicatio* of the owner of the thing claimed (see *Strachan v Blackbeard and Son* 1910 AD 282; *Monzali v Smith* 1929 AD 382). In *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) 420 (A), Steyn JA stated very clearly that in the case of *rei vindicatio* there should be at least negligence on the part of the estoppel-denier. The facts of this case were briefly as follows: K was introduced to the respondent by P as a possible purchaser of the respondent's motorcar. K decided to buy the motorcar, but stated that he did not have his cheque book with him, having left it in Welkom. Arrangements were made for P to accompany K to Welkom and there to give K possession of the motorcar as against delivery of the cheque. In view of the fact that the respondent had lost the licence papers of the motorcar he gave K, at his request, a written document to explain his possession of the motorcar in the event of any enquiries. The document, which was signed by the respondent, contained *inter alia* the statement that the respondent had sold the motorcar to K. The respondent carried out his side of the contract, but K's cheque was dishonoured. In the meantime K had sold the car to the appellant. The appellant pleaded estoppel against the *rei vindicatio* of the respondent. Both the Supreme Court and the Appellate Division rejected this plea of estoppel. Steyn JA adopted the view that *culpa* on the part of the estoppel-denier was required before the estoppel-asserter could succeed. At 427 he remarks, with reference to estoppel:

That principle appears to be that an owner forfeits his right to vindicate where the person who acquires his property does so because, by the *culpa* of the owner, he has been misled into the belief that the person from whom he acquires it, is entitled to dispose of it.

A little further on the same page, he continues:

In order to establish the defence of estoppel the appellant, apart from the facts which are not in dispute, had to prove that *culpa* on the part of the respondent caused him to be misled into the erroneous belief that Kriel had the right to dispose of the car.

*Johaadien v Stanley
Porter (Paarl) (Pty)
Ltd*

The requirement of fault was hereafter again considered by the Appellate Division in two cases where the plaintiff's claim was based on the *rei vindicatio*. In *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) the facts were briefly the following: J wanted to buy a motorcar from F, but wished to obtain some evidence of F's alleged ownership. F referred J to the Stanley Porter Garage. In answer to J's inquiry, the representative of the garage informed J that F had bought the motor car under a hire-purchase agreement, that he had paid the last instalment and that the garage consequently had no further right to the car. Acting on this information, J bought the motorcar from F. At a later stage it appeared that F had not become owner of the motorcar and Stanley Porter claimed the motorcar from J by means of the *rei vindicatio*. J raised estoppel on the ground of the information supplied to him by Stanley Porter. His raising of estoppel did not succeed since he could not prove negligence on the part of the garage. The majority of the Appeal Court decided, per Steyn CJ, that negligence as laid down in the *Grosvenor Motors v Douglas* case was a requirement for estoppel where it was raised as a defence against the owner's *rei vindicatio*. It

was required that a reasonable person in the position of the plaintiff (Stanley Porter, the estoppel-denier) should have realised that the information with which he provided the defendant (Johaadien, the estoppel-asserter) was untrue or possibly untrue (399E, F), and in the absence of such realisation there could be no question of negligence (see the explanation at the beginning of this section). However, the defendant, J, did not allege that the plaintiff was negligent. He submitted that it was sufficient for a successful invocation of estoppel if the party who created the impression had simply foreseen (or ought to have foreseen) that the third party would act on the ground of his representation, and not that he was also aware (or ought to have known) of the untruthfulness of his representation (395H). Steyn CJ rejected this argument, holding that estoppel could not succeed in the absence of proof of negligence, and that the defendant should hand over the motorcar to the plaintiff, the true owner. However, in his minority judgment Rumpff JA adopted the view that negligence in these particular circumstances was not a requirement and that the defence of estoppel should be upheld. He was of the following opinion (as was submitted on the defendant's behalf): "If the misrepresentation was of such a nature that a prospective buyer could reasonably be expected to be led by the representation to buy without enquiring about the ownership of the thing, the buyer who is moved by such a misrepresentation, should be protected" (411G, H; our translation). Nor was it necessary, according to him, that the plaintiff expressly allege negligence in order to be able to succeed.

It should be clear that it would be much easier for an estoppel-asserter to repudiate the owner's *rei vindicatio* if he or she needed prove only that the owner's representation was of such a nature that it could reasonably be expected that someone would act on it, and not also that the owner (or rather, a reasonable person in the owner's position) was or ought to have been aware of the untruth or possible untruth of his or her statement.

What is the essence of the incompatibility of the majority and minority judgments? What is at issue here is a weighing up of the interests of the true owner on the one hand and of the *bona fide* acquirer of possession on the other (408C). The Roman-law rule *ubi meam rem invenio, ibi vindico* (where I find my thing I claim it) provides ownership with particularly strong protection. This rule applies in South African law. There are only a few exceptional cases (one of which is the successful invocation of estoppel) where the owner cannot rely on the *rei vindicatio* to recover the thing of which he or she has lost possession. In contrast with the *rei vindicatio* principle, the Germanic-law rule *mobilia non habent sequelam* (movables cannot be pursued) provides no protection to the owner of a thing, but is to the advantage of the *bona fide* acquirer of possession. The last-mentioned rule (which, but for a few exceptions that are not at issue here, does not apply in our law) holds that an owner cannot recover his or her thing from *bona fide* possessors if he or she voluntarily surrendered its possession. Unlike our law, certain Continental systems, including those of Holland and Germany (see 404–6), were influenced by the *mobilia* rule to the extent that a *bona fide* acquirer of possession becomes, subject to certain restrictions, the owner of another's thing (even where the thing does not belong to the person estranging it) (405A). Apparently there is a need in the commercial intercourse of those legal systems to protect, within limits, the *bona fide* (faultless) acquirer of possession rather than the *bona fide* (faultless) owner (see also Louw 1975 *THRHR* 218 *et seq.*).

Relying on the *Grosvenor Motors* case, the Chief Justice expressed the following opinion, accepted by the majority of the court: '*n Uitbreiding van*

uitsonderingsgevalle (to the *ubi rem meam invenio* rule) is *nie geredelik aan te neem nie*'' (406D). This means: An extension of exceptions [to the *ubi rem meam invenio* rule] will not readily be adopted. (Our translation.) The traditional protection of ownership is too strong for this. Only when the owner makes a culpable misrepresentation will his or her *rei vindicatio* be repudiable by estoppel.

Rumpff JA, in the minority judgment, cites common-law authority to show that the requirements of commercial intercourse as such can have a restrictive influence on the effect of the *rei vindicatio*. Since the requirements of modern commercial intercourse are far different from those of the past, at present the owner's *rei vindicatio* can be restricted on the ground of the requirements of contemporary commercial intercourse by means of the doctrine of estoppel (411D). Note that the estoppel doctrine in our law fulfils the same function in this regard as the *mobilia* rule: as a defence against the owner's *rei vindicatio* it limits the owner's power of vindication regarding his or her thing. However, the strict requirements with which estoppel must comply limit its tempering influence so that the interests of the *bona fide* acquirer of possession are not protected to the same extent as under the *mobilia* doctrine. Rumpff JA's approach, however, causes the requirements for estoppel to be relaxed to such a degree that the *bona fide* acquirer of possession can repudiate the owner's *rei vindicatio* far more easily: under certain circumstances where modern commercial intercourse requires it (as, in the judge's opinion, *in casu*), the owner need no longer prove that the misrepresentation by the owner was made in a culpable way.

How does *Johaadien's* case influence the requirement of fault in estoppel? Expressed in the widest terms, it can perhaps be seen as the beginning of a possible development which may result in the abandonment of the requirement of fault for estoppel as a defence against the *rei vindicatio* in cases where factors like the requirements of contemporary commercial intercourse or equity necessitate it. It is interesting to note that Steyn CJ was not prepared to formulate the requirement of fault uniformly for all cases where estoppel is at issue:

Daar is ruimte vir differensiasie ooreenkomstig die beginsels en billikheidsvereistes wat gevalle beheers wat verskillend van aard is. Daar sou dus niks ongerymds in wees om by 'n eiendomsvoordering 'n skuldvereiste te stel, al sou dit nie as algemene vereiste by estoppel kan geld nie (403A). (There is room for differentiation in accordance with the principles and dictates of fairness which govern instances of different nature. Therefore there is nothing untoward in requiring fault when claiming property, even though it is not a general requirement for estoppel.) (Our translation.)

Although the Chief Justice was unwilling to express himself directly on the point, he nevertheless foresaw specific cases of estoppel even in cases of *rei vindicatio* which did not necessarily rest on fault (409E-G).

Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd

In this regard the judgment in *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 452 is important. The following dictum states the legal position:

South African law of estoppel in regard to ownership

Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has

some enforceable right against the owner. Consistent with this, it has been authoritatively laid down by this Court that an owner is estopped from asserting his rights to his property only

- (a) where the person who acquired his property did so because, by the *culpa* of the owner, he was misled into the belief that the person, from whom he acquired it, was the owner or was entitled to dispose of it; or
- (b) (possibly) where, despite the absence of *culpa*, the owner is precluded from asserting his rights by compelling considerations of fairness within the broad concept of the *exceptio doli*. [It should, however, be noted in this regard that the *exceptio doli* is no longer part of our law. See *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A).]

As to the formulation in (b), *supra*, the occasion has not yet arisen for its further development by this Court. Certainly it does not arise in the present appeal, having regard to the pleadings, the evidence, and the arguments in this Court. As to (a), *supra*, it may be stated that the owner will be frustrated by estoppel upon proof of the following requirements —

- (i) There must be a representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner of it or was entitled to dispose of it. A helpful decision in this regard is *Electrolux (Pty.) Ltd. v Khota and Another* 1961 (4) S.A. 244 (W), with its reference at p. 247 to the entrusting of possession of property with the *indicia* of *dominium* or *jus disponendi*.
- (ii) The representation must have been made negligently in the circumstances.
- (iii) The representation must have been relied upon by the person raising the estoppel.
- (iv) Such person's reliance upon the representation must be the cause of his acting to his detriment.

As to (iii) and (iv), see *Standard Bank of S.A. Ltd. v Stama (Pty.) T Ltd.*, 1975 (1) S.A. 730 (A.D.). Over the years there have been many decided cases in this country dealing with estoppel. They will be found in the reported arguments of counsel in the present appeal. I do not consider it necessary to discuss, distinguish or approve of them one by one. It is sufficient to say that they are useful only if and in so far as they are consistent with the milestone decisions of this Court in the *Grosvenor Motors* case, and the *Johaadien* case, above. In particular, company share certificates with blank transfer forms are not, in law, negotiable instruments. There is therefore no basis, in law, for regarding them as being excepted from the principle stated above; although their transferability, as distinct from negotiability, may, depending on the circumstances, be relevant in considering the question of negligent representation, *supra*.

From the case law discussed thus far, it is therefore clear that the requirement of fault (negligence) is stated unequivocally for cases where estoppel is raised as a defence against the *rei vindicatio* (excluding the possible exception based on equity mentioned in the *Johaadien* and *Oakland Nominees* cases).

4.3 CASES WHERE NEGLIGENCE IS NOT REQUIRED

4.3.1 Cases where the *rei vindicatio* is not applicable

negligence not a general requirement

Apart from the cases where estoppel was raised as a defence against the *rei vindicatio* and fault was unequivocally recognised as a requirement (excluding the possible exceptions just discussed), there are cases where estoppel is used as defence but the *rei vindicatio* is not at issue. Is fault in the form of negligence required in such cases? In spite of the fact that De Wet argued in 1939 that fault should be a requirement for estoppel in all instances, and in spite of earlier cases which apparently supported this assumption (see the *Preus* and *Silver* cases, as well as *Strachan v Blackbeard & Son* and *Monzali v Smith* above), the Transvaal and Natal provincial courts have since the 1950s accepted the viewpoint in certain cases which have had nothing to do with the *rei vindicatio*, that fault (here negligence) is not an essential requirement for estoppel.

Coetzee v Van der Westhuizen and Another

In *Coetzee v Van der Westhuizen and Another* 1958 (3) SA 847 (T) the plaintiff had bought a tractor on hire-purchase from the first defendant. The latter discounted the contract with the second defendant. The plaintiff alleged that he had signed the contract, together with an admission that he had received notice that the contract was to be ceded, while he was not wearing his glasses and after he had been given the assurance that the document contained only the terms expressly agreed to by the parties. In fact, he averred that he had never agreed that all express and implied representations and warranties be excluded and that he had inspected the tractor and found it satisfactory, as the contract read. He claimed rectification of the contract as well as repayment of instalments and cancellation of the contract. The second defendant raised the defence of estoppel to which the plaintiff excepted on the ground, inter alia, that negligence was not alleged. Galgut J (with whom Williamson J concurred) refused the exception although he was inclined to think that a trial court would quite possibly hold, on the facts, that negligence had been present. Negligence, according to the court, is not a *sine qua non* for the defence of estoppel. The argument was that “the principle *nemo contra suum factum venire debet* is still very much part of our law”. By signing the document the plaintiff implied “in clear and unequivocal terms” that he was bound to the contract embodied in the documents; he could not aver as against the second defendant that the contract did not bind him. As will become apparent later, the maxim quoted indicates how estoppel operates in practice but does not embody any principle in itself. Van der Merwe 1961 *THRHR* 293 puts it as follows:

The judgment of Mr Justice Galgut in the *Coetzee* case is a striking example of the fact that a wrong point of departure will be revenged by reality. The incorrect *a priori* that the *adagium nemo contra suum factum venire debet* forms the basis of the doctrine of estoppel now creates the situation where the requirement of fault, always regarded by our Appellate Division as a *sine qua non* for the application of estoppel, is now conveniently sidestepped by a lower court. Because faulty insights about the basis of estoppel prevail, a second mistake is made — the requirement of fault is sacrificed. (Our translation.)

This criticism is based on the theory that estoppel is a species of delictual remedy and that fault is therefore a general requirement as in the case of a delictual action for damages. As will be evident later on, estoppel is not simply a delictual remedy and consequently the criticism can be rejected.

In *Pennefather v Gokul* 1960 (4) SA 42 (N), the Natal court still required *culpa*, but in *Trust Bank of South Africa Ltd v Maharaj* 1961 (2) SA 770 (N), Williamson JP stated the following, apparently on the authority of the *Coetzee* case: "It is unnecessary to find whether he (the estoppel-denier) was negligent or not." Here the respondent signed a hire-purchase form in blank, after which it was completed by an employee of the firm, D Motors, as a hire-purchase agreement between the respondent and D company, in terms of which the respondent bought a certain car from such company. In fact the car belonged to the respondent. D company had the "hire-purchase agreement" discounted by the appellant. The whole scheme was designed to enable a certain N to acquire cash for the purpose of buying the respondent's car. (The idea was that N would be indebted to the appellant.) The appellant then claimed payment from the respondent in terms of the discounted hire-purchase agreement. The respondent in his defence averred that he had signed the form in blank and that he had never had the intention of entering into a contract. The appellant set up a plea of estoppel which succeeded. Although the court denied that negligence was essential, it would appear that, as in the *Coetzee* case, negligence at least was present.

In *Trust Bank van Afrika Bpk v Van der Walt* 1962 (1) SA 174 (T), which is also a case where the *rei vindicatio* did not feature, the defendants, who on a previous occasion had bought a motor vehicle on hire-purchase from M Motors without any difficulties ensuing, agreed with M Motors to buy a truck on hire-purchase, provided that their next harvest proved successful. To speed up the final arrangements, M Motors persuaded them to sign a hire-purchase form in blank. The form contained the usual clauses that the purchaser had inspected the article and found it satisfactory, that the document embodied the whole contract, that no other representations or guarantees were made, that the seller was to cede the contract and that such cession was accepted by the purchaser. The purchaser also acknowledged receipt of the truck. M Motors then completed the form in a fashion and discounted it with the plaintiff. The plaintiff thereupon sued the defendants for payment, but in the meantime the defendants' harvest had failed entirely and they refused to pay on the ground that no valid contract existed. The plaintiff invoked estoppel.

According to Galgut J's point of departure in the *Coetzee* case, the question of the estoppel-denier's negligence is irrelevant. The only question is whether he was attempting to go back on a previous representation that a valid contract existed. On the facts the judge found that the estoppel-deniers had made no representation whatsoever:

The document in its then form i.e. at the time when it was signed, contained no representation. It was at that stage not a contract at all. It was not expected or intended that any representation would or could be made on the documents. In the *Coetzee*, *Malan* and *Maharaj* cases it was realised that a representation would be made on the signed document and the effect of the decisions was that they were held to have made the representations contained in the documents. In the present case no representation was intended nor was it believed any would be made.

One must object to this finding on the ground that the question whether a representation, that is a misrepresentation, has been made should not be completely dependent on the estoppel-denier's intention. In any case, it is an open question whether the signing of a blank hire-purchase form is not in itself a misrepresentation. Does it reflect an untruth? The signatory merely enables

the other to make a misrepresentation by completing the form and this contributes to the making of a misrepresentation.

Without a word about his previous judgment that negligence is not a requirement, the judge then proceeded to investigate the question of negligence on the part of the estoppel-denier. The court found not only that the estoppel-denier was not negligent, but also that the estoppel-asserter himself had acted incautiously by omitting to investigate the existence and condition of the motor vehicle. Thus the defence of estoppel failed.

Therefore this case does not require negligence as a prerequisite for estoppel either. However, the investigation into the question of negligence seems strange in the light of the judge's earlier rejection of the requirement of fault in cases where the *rei vindicatio* is not at issue. After this it was nevertheless *obiter* implied by Steyn AJ in the *Johaadien* case that fault is not necessarily required for estoppel where the *rei vindicatio* is not at issue (see his remark on 403A). In *Sunday v Surrey Estate Modern Meat Market (Pty) Ltd* 1983 (2) SA 521 (C) it was decided unequivocally that fault in the form of negligence is not a requirement for estoppel in instances where the *rei vindicatio* is not at issue. This, then, appears to be the current legal position. However, just how uncertain the situation still seems to be is aptly demonstrated by the recent decision in *IFP Nominees Pty (Ltd) v Nedcor Bank Ltd; (Basfour 130 Pty (Ltd), Third Party)* 2002 (5) SA 101 (W) where Claasen J said:

To prove an estoppel negligence must as a general rule be alleged and proved by the party who relies upon estoppel as a defence. See *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A).

This dictum is contrary to the general tendency to require negligence only in the *rei vindicatio* cases. The reference to the *Johaadien* case also seems to be incorrect in that the *Johaadien* case actually implied that fault was not a general requirement for estoppel.

4.3.2 A possible exception: the agent for sale or factor

There is one further class of cases which has not been dealt with thus far. In *Morum Bros v Nepgen* 1916 CPD 392; *Adams v Mocke* 23 SC 722; *Electrolux v Khota* 1961 (4) SA 244 (W); and *Grosvenor Motors (Potchefstroom) Ltd v Douglas* above, mention is made of an exception to the rule that negligence is required for a successful plea of estoppel against the *rei vindicatio*. This exception is made in cases where the owner entrusted the thing to an agent for sale or factor. Apparently, fault on the part of an owner was not required in Roman-Dutch law for estoppel to be successful where the owner had entrusted his or her thing to such a person. In *United Cape Fisheries v Silverman* 1951 (2) SA 612 (T) and more recently in *Akojee v Sibanyoni* 1976 (3) SA 440 (W) the court ignored the fault requirement in cases of estoppel raised against the *rei vindicatio*. Writers have explained the oversight as instances of the abovementioned exception, although this explanation is not expressly mentioned in the cases (see eg Blecher 1977 SALJ 1, *Amicus Curiae* 1977 SALJ 256 and, for a criticism thereof, Sonnekus 1977 TSAR 176).

In the meantime, in *Pretorius v Loudon* 1985 (3) SA 845 (A), the Appellate Division expressed doubt about the question whether this exception is still applicable in South African law today, and the position is consequently

uncertain. Lewis (1986 *SALJ* 69) opines that at present all cases should be treated in accordance with the general rules of estoppel as they exist in South African law and that these rules include the requirement of negligence in cases of *rei vindicatio*. As was explained above in connection with the *Johaadien* case, the heart of the problem is once again the weighing up of the interests of the owner against those of the *bona fide* acquirer of possession, in the light of the requirements of commercial intercourse.

4.4 FAULT ON THE PART OF THE DECEIVED PERSON

In conclusion, estoppel can be raised successfully only if the deceived party himself or herself has not been negligent. For example, anyone who, without making inquiries, assumes that the possessor is also the owner, is usually himself or herself negligent (*Adams v Mocke* above; see also *LMS Electrical Engineers v Tassburg Screw Industries* 1980 (3) SA 1043 (Z)). Often the negligence of the deceived (estoppel-asserter) amounts to the negation of fault on the part of the deceiver (estoppel-denier) — after all, the negligent act of another person will not always be reasonably foreseeable. However, if the misrepresentation is intentional it will be of no avail to assert that the other party was negligent. In that event the act was specifically aimed at deceiving the other party, regardless of whether the other was negligent or not (*Strydom v Scheepers* 1942 GWL 73).

SELF-ASSESSMENT

- (1) Is intent a requirement for a successful reliance on estoppel? Briefly discuss.
- (2) Explain the test for negligence in cases of estoppel.
- (3) Is negligence a requirement for a successful reliance on estoppel? Discuss in detail, citing relevant case law.
- (4) In which cases of estoppel is negligence required? Discuss in detail, citing case law.
- (5) Why is negligence required if estoppel is raised against the *rei vindicatio*, but not in other cases?
- (6) In which cases of estoppel is negligence not required? Discuss in detail, citing case law.
- (7) The light meter of John's camera malfunctions. John takes his camera to a camera dealer for repairs. After the technician has repaired the camera, he absent-mindedly leaves it among second-hand cameras offered for sale. Peter buys the camera from the store. When John discovers this, he claims the camera from Peter. Peter raises estoppel. Must Peter prove negligence on John's part in order to succeed with his reliance on estoppel? Advise.
- (8) What is the effect of fault on the part of the person who has been misled (the estoppel-asserter)?

FEEDBACK

- (1) See 4.1. Consider why intent should not be a requirement for a successful reliance on estoppel. As a matter of interest, can you think of instances in the law of delict where intent is required in order to establish liability?
- (2) See 4.1. Compare the test for negligence in regard to estoppel with the test for negligence in the law of delict. Is there any difference between the two?
- (3) See 4.2; 4.3.1; and 4.3.2. You may focus on decisions of the Appellate Division (now known as the Supreme Court of Appeal). This is a very important aspect of the study material and you should study it carefully. To practise, prepare a rough draft of your answer to such a question as if it were asked in an examination. Bear in mind that the material suggests a mark allocation of approximately 20 to 25 marks for such a question.
- (4) See 4.2. You may focus on decisions of the Appellate Division. This is but one aspect of the previous question. Bear in mind that the question of negligence as a requirement for estoppel is still a controversial one and the Supreme Court of Appeal has yet to settle the matter once and for all.
- (5) See 4.2. (This question deals with the strong protection afforded ownership in our law.) As a matter of interest, consider other areas of law where the protection of ownership actually has been eroded.
- (6) See 4.2; 4.3.1; and 4.3.2. Do not miss the exceptions mentioned in 4.2. Questions (3) to (6) are interrelated and therefore their answers tend to overlap. However, some of these questions focus on specific aspects of the negligence requirement in estoppel. Remember that these different aspects are all relevant.
- (7) See 4.2. Of course John institutes the *rei vindicatio* to get his camera back, and therefore Peter must prove negligence on John's part. You must substantiate your answer properly with reference to relevant case law. (Do you remember that merely leaving your thing in the possession of another person does not necessarily amount to a misrepresentation that the other person has the right of ownership or the right to dispose of the thing? See 3.2.4 in the previous study unit.)
- (8) See 4.4. This aspect is very important because fault on the part of the estoppel-asserter may have the effect of precluding reliance on estoppel. Have you considered why intentional misrepresentation will nullify negligence on the part of the estoppel-asserter? Refer to your study material on the law of contract and law of delict in relation to culpable misrepresentation. You will find similar approaches.

FEEDBACK: PRACTICAL SCENARIOS

Scenario 1

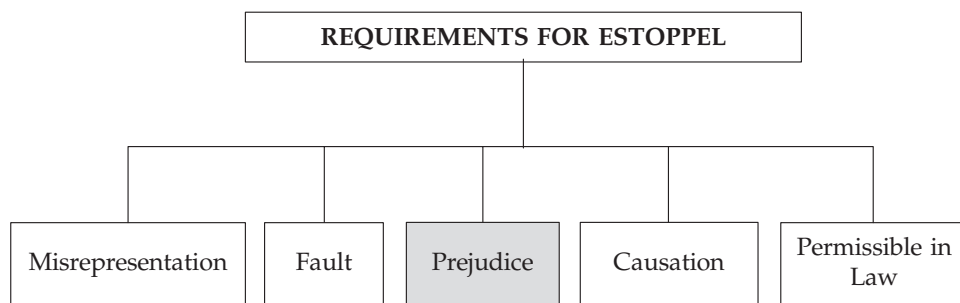
The scenario is based on the facts of *Riddelsdell v Williams* 1874 Buch 11 discussed in paragraph 4.2 above. It provides an illustration of circumstances in which the estoppel-denier clearly was negligent and therefore justifiably not permitted to rely on the actual state of affairs. Consider, however, the effect of judgments such as this one against the approach of the Appellate Division in other cases discussed in paragraph 4.2.

Scenario 2

This is a case where negligence on the part of owner will probably have to be proved to invoke estoppel successfully against the owner's *rei vindicatio*. Since the owner was negligent in leaving the registration papers of the car in it when he left it with a person who *inter alia* sold second-hand cars, a plea of estoppel should succeed. See paragraph 4.2 in this study unit. Also refer to paragraph 3.2.4 in study unit 3. As previously mentioned, the aspects of entrusting one's article to another and negligence are usually the focal points when the article ends up in the hands of a third party who invokes estoppel against the *rei vindicatio* of the owner.

REQUIREMENTS FOR A SUCCESSFUL RELIANCE ON ESTOPPEL: PREJUDICE

OVERVIEW



In this study unit we discuss a further requirement for a successful reliance on estoppel, namely prejudice.

PRACTICAL SCENARIO

Scenario

A sells merchandise to customers on standard terms and conditions. To ensure a sale and commission, A's agent misrepresents facts to B as a result of which B enters into a contract with A on terms different to A's standard terms. A alleges a contract on the basis of his standard terms and B invokes estoppel in order to maintain a contract on the basis of the misrepresented facts. Must B prove actual, patrimonial prejudice in order for estoppel to be maintained or does the mere entering into of the contract suffice to constitute prejudice?

SELF-EVALUATION GOALS

After completing this study unit you should be able to

- explain what the requirement of prejudice in cases of estoppel entails and give examples
- explain in detail the difference between the two approaches to determining prejudice in cases of estoppel and give examples

PRESCRIBED CASE LAW

Baumann v Thomas 1920 AD 428

ADDITIONAL READING MATERIAL (OPTIONAL)

Rabie LAWSA par 661–663

Rabie & Sonnekus 99–119

Visser & Potgieter 131–166

Van der Walt “Wat word van die nadeelvereiste by bedrog en estoppel?”
1973 *THRHR* 386

Van der Merwe & Van Huyssteen “A perspective on the elements of estoppel
by representation” 1988 *TSAR* 568

South British Insurance Co Ltd v Glisson 1963 (1) SA 289 (D)

Peri-Urban Areas Health Board v Breet 1958 (3) SA 783 (T)

Autolec Ltd v Du Plessis 1965 (2) SA 243 (O)

Mthanti v Netherlands Insurance Co of SA Ltd 1971 (2) SA 305 (N)

Thompson v Voges 1988 (1) SA 691 (A)

Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd 1963 (1) SA 632 (A)

Durban Corporation Superannuation Fund v Campbell 1949 (3) SA 1057 (D)

5.1 INTRODUCTION

The person relying on estoppel must prove that through the misrepresentation the person misled has changed his or her position to his or her prejudice, whether by failing to act or by acting.

example

For example, the person may have made a payment when buying something from a non-owner, or he or she may have failed to gain an advantage or to terminate a contract (eg *Nzimande v Smuts* 1960 (3) SA 264 (O)), or he or she may have contracted with a third party or incurred an expense which he or she would not otherwise have done (eg *Autolec Ltd v Du Plessis* 1965 (2) SA 243 (O); *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D)).

5.2 TWO APPROACHES

De Wet 17 avers that the prejudice which the estoppel-asserter stands to suffer if his or her reliance on estoppel fails, must be patrimonial prejudice. Prejudice in this sense equals the concept of “patrimonial loss” and is determined by comparing the actual patrimonial position of the aggrieved person (if his or her plea of estoppel fails) with a hypothetical position, namely the position he or she would have been in **had he or she never been misled**, that is if the misrepresentation were true. If the patrimonial position which he or she would have been in, is better than his or her actual position at the moment, that is should the plea of estoppel fail, prejudice exists. In other words, the patrimonial position in which the estoppel-asserter finds himself or herself at the moment of *litis contestatio* must be compared with the hypothetical patrimonial position in which he or she would have been (at the moment of *litis contestatio*) had no false belief been created. There is prejudice if the former is at all less advantageous than the latter. Recently in *Jonker v Boland Bank Pks Bpk* 2000 (1) SA 542 (O) the

court held that the type of prejudice which underlies a successful invocation of estoppel is patrimonial in nature.

Unfortunately our courts have not always approached the question of prejudice correctly.

example

So, for example, De Wet 17 points out that the Appellate Division in *Baumann v Thomas* 1920 AD 428 conceived the problem incorrectly. Here a certain Heron found himself in dire financial straits, and came to an agreement with his creditors to pay them a monthly sum of R40. B stood surety for the payment by H on the condition that a bond be passed in his favour over H's property. In terms of this agreement, H paid R720 — more than two-thirds of the original debt. Thereafter he failed to pay. T, as trustee for the creditors, now demanded the amount of R120 from B. B's defence was that the bond had never been passed. Against this contention T pleaded that B had misled him into thinking that the bond had in fact been registered and that B was bound by estoppel notwithstanding the fact that the bond had not been registered. The court held that there could be no estoppel as against B, because T had suffered no prejudice. The judge held that if the agreement had not been entered into with H, the creditors would not have received two-thirds of their claims; they would consequently have been in a worse position than they were. As De Wet 17 points out, the mistake which the court made was to compare the actual position not with T's position had the misrepresentation not been made by B, but with a totally different situation. If B had not been misled into thinking that the bond had been registered, he would in all probability have taken care to ensure that it was in fact done. This is the position which the court should have taken into account. T would have ensured that H registered the bond and would therefore have been able to sue B upon H's failure to pay. Therefore, T was in fact prejudiced by the impression created by B.

However, the prejudice which must exist before a plea of estoppel can succeed is sometimes extended to include more than actual patrimonial loss already suffered. The estoppel-asserter need not show that he or she has already suffered actual patrimonial loss. The mere fact that a person will suffer patrimonial loss if his or her reliance on estoppel fails is in itself sufficient prejudice.

example

Even the possibility or probability that patrimonial loss will be suffered has been regarded as sufficient prejudice for a successful reliance on estoppel — see *South British Insurance Co v Glisson* above, where the loss of a contingency right to reimbursement by an insurance company was held to be sufficient prejudice.

It was stated in the same vein in *Autolec Ltd v Du Plessis* above (250) that prejudice "is not limited to direct, instantaneous and palpable loss of money but also includes less gross and easily calculable detriment". However, the argument was qualified by requiring that "the change of position must involve the practical or business affairs of the representee and not merely affect him philosophically or in his religious or other sentimental values".

The case of *Peri-Urban Areas Health Board v Breet NO and Another* 1958 (3) 783 (T) shows how widely "prejudice" is sometimes construed in this context. Trollip

AJ points out that prejudice is a requirement for a successful plea of estoppel — also in cases of error in the conclusion of a contract. At 790 he states:

It follows that the party invoking the principle must prove all the requirements of estoppel in order to succeed, including the requirement of prejudice, that is “detrimental action in reliance on the manifestation”. The need to prove prejudice before the principle can be successfully invoked was not referred to in the cases cited above in which the principle was applied (e.g. *Hodgson Bros v SAR & H* 1928 CPD 257) and it was not mentioned as a requisite in *Van Ryn Wine & Spirit Co. v Chandos Bar* but I think that it must be regarded as an essential element in the successful application of the principle. It may be that it is not expressly referred to in those cases because prejudice in relation to estoppel has such a wide connotation and the very act of the one contracting party in entering into the contract in reliance on the other’s conduct will be regarded in most bilateral contracts as a sufficient alteration of his position to his detriment to meet the requirement of prejudice. The party relying on the principle must show some kind of prejudice, even of the minimum kind just mentioned.

It would appear from this approach that the requirement for prejudice is fulfilled if the estoppel-asserter proves only that he or she has changed his or her legal position by entering into a contract or what appeared to be a contract, without having to prove that he or she has incurred expense, or that he or she would have ensured that the contract was valid or that he or she could profitably have contracted elsewhere, and so on. If this is correct, it appears that prejudice simply refers to a change in a person’s **legal position**, provided the estoppel-asserter does not or would not find himself or herself in a better position than that in which he or she would have been had the impression not been created. Incurring a debt or liability or losing a right or claim **as such**, without any prejudicial financial implications, will be accepted as sufficient prejudice for a successful plea of estoppel.

In a discussion of *Mthanti v Netherlands Insurance Co of SA* 1971 (2) SA 305 (N), where the judge was of the opinion that it was unnecessary to decide whether mere loss of time in the form of a delay relating to the precise time at which a case served before the court qualifies as prejudice for estoppel (because this prejudice was *in casu* not proved), CFC van der Walt (1973 *THRHR* 391) pointed to the problems raised by the wider approach to the contents of the requirement of prejudice for estoppel. He wrote as follows:

In the current state of our law no clarity exists about the content of the prejudice requirement for fraud and estoppel. Certain tendencies must be pointed out: Exactly what may be included in the concept of prejudice is not clear, but that the prejudice requirement is wider than direct financial damage, to include also *lucrum cessans* [generally, loss of profit], expenses incurred that are not useful, incurred liability, and more heads of damage, is clear from the case law discussed. A *numerus clausus* of heads of possible damage can hardly be envisaged while the prejudice requirement is formulated as widely as is apparent from the *Breet* case.

Two views regarding the content of the prejudice requirement are apparent from case law: According to one of them (the narrower, corporeal approach) prejudice exists only when it is apparent from an application of the comparative method. According to the other (the wider,

conceptual approach), prejudice already exists in the loss of a right or the incurring of an obligation. Stated differently, the prejudice exists in the infringement of a right itself. This school of thought does not want to apply the comparative method to determine whether prejudice has been suffered in a given case. It is of the opinion that to determine whether a change in the legal position has occurred, that is, whether there has been a diminution of rights, it serves little purpose to compare the involved person's current position with a hypothetical one, to make a sum of deduction, and so to determine the prejudice, if any. They rather ask whether, viewed objectively, a change in the legal position has taken place. Is the answer to this inquiry in the affirmative? In other words, sufficient prejudice has been suffered to found either a charge of fraud or a reliance on estoppel. This wide approach apparently differentiates between prejudice (the diminution of a right) and prejudice-damage (the result of an application of the comparative method). Apparently "prejudice" may thus exist in the absence of "damage".

Damage is then probably the result of a quantification of the prejudice, arrived at by the application of the comparative method. (Our translation.)

Van der Walt JC (*JC Noster* 489) is also of the opinion that the wider approach indicates that the requirement of prejudice for estoppel is not of a patrimonial nature, but should rather be judged normatively in as much as any reasonably unacceptable change in the (legal) position of the aggrieved constitutes sufficient prejudice.

On the other hand, there are still those (Van der Merwe & Van Huyssteen 1988 *ISAR* 569–570) who think that even the wider approach to the prejudice requirement for estoppel simply means that prejudice does not refer only to actual patrimonial loss already suffered. It also includes possible, even uncertain, future patrimonial loss, but the prejudice required must, according to them, still (in accordance with the present state of affairs) be a **patrimonial** loss or prejudice in that it affects the patrimonial position of the aggrieved (potentially) detrimentally.

In conclusion, you must note that since the doctrine of estoppel is designed to prevent prejudice, estoppel operates only to the extent to which a person would suffer prejudice. For example, if B were negligently to represent to A that B owes him R2 000 and A, relying on the impression thus created, were to waste R100, he would be able to plead estoppel as protection, to an amount to R100 at most — and even that is doubtful. Compare *Durban Corp Superannuation Fund v Campbell* 1949 (3) 1057 (N) where the following question is asked at 1069:

Assuming for instance R1 000 was paid by negligently representing to the payee that it was owing, and the payee altered his position by dissipating R50 of it, can it be said that because of that prejudice he can retain the balance of R950?

The answer should obviously be in the negative. This question was also raised in *Thompson v Voges* 1988 (1) SA 691 (A) 711, but not decided.

SELF-ASSESSMENT

- (1) Explain what the requirement of prejudice in case of estoppel entails and give examples.
- (2) Differentiate in detail between the two approaches to the requirement of prejudice in the South African law of estoppel. Refer in your answer to case law and the opinions of authors.

FEEDBACK

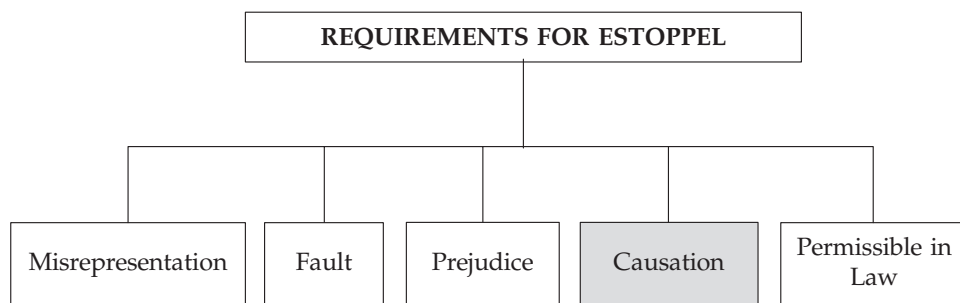
- (1) See 5.1 and 5.2. The question of prejudice as a requirement for estoppel is as controversial as the issue of negligence, and a resolution in either case does not seem to be imminent. Have you considered why there should be a requirement of prejudice at all? The question of prejudice also features in the context of reliance-based contracts, although there it does not seem to be a prerequisite. Consult your study material on the law of contract and paragraph 8.5 in study unit 8 in this regard.
- (2) See 5.2. This question and the previous one overlap. Which approach do you consider to be the more appropriate? Give reasons for your answer.

FEEDBACK: PRACTICAL SCENARIO

The scenario is based loosely on the facts of *Van Ryn Wine and Spirit Co v Chandos Bar* 1928 TPD 417, although in that case the seller was the party who (unsuccessfully) invoked estoppel. In your approach to this problem you should critically consider both approaches to the element of prejudice. Although there is authority for both approaches, *inter alia* on the basis of *Peri-Urban Areas Health Board v Breet* 1958 (3) SA 783 (T), the mere entering into a contract may be regarded as a sufficient change in position to satisfy the detriment requirement. Consider whether, on the basis of existing authority, a court would be entitled to approach this matter strictly and require actual, patrimonial prejudice for reliance on estoppel in such circumstances.

REQUIREMENTS FOR A SUCCESSFUL RELIANCE ON ESTOPPEL: CAUSATION

OVERVIEW



We are still dealing with the requirements for a successful reliance on estoppel. In this study unit the focus is on causation.

PRACTICAL SCENARIO

A sells and delivers a car to B. A also provides B with documents indicating that the car has been paid for in cash and the registration documents for the car. B pays by cheque and soon thereafter sells the car to C. B's cheque is dishonoured and A attempts to reclaim the car from C who pleads estoppel against A's claim. Will the plea of estoppel succeed in the circumstances?

SELF-EVALUATION GOALS

After completing this study unit you should be able to

- explain in detail the test employed by the courts to test for causation in cases of estoppel
- illustrate the application of the abovementioned test with an example from case law
- explain whether both factual and legal causation are relevant in cases of estoppel
- explain whether the conduct of an intervening third person who has been placed in a position by the estoppel-denier of making the estoppel-asserter believe that he was owner of the estoppel-denier's thing or had the right to

dispose thereof, will always be the “proximate cause” of the estoppel-asserter’s prejudice

PRESCRIBED CASE LAW

Union Government v National Bank of SA Ltd 1921 AD 121

ADDITIONAL READING MATERIAL (OPTIONAL)

Rabie *LAWSA* par 664–665
Rabie & Sonnekus 121–132
Visser & Potgieter 169–208
Hoffman & Zeffert *The SA Law of Evidence* 363 (par (j))
Van Huyssteen & Van der Merwe “Estoppel by representation: The ambiguity of an ‘unambiguous representation?’” 1990 *TSAR* 88–89
Saambou-Nasionale Bouvereniging v Friedman 1979 (3) SA 978 (A)
Grosvenor Motors (Potchefstroom) Ltd v Douglas 1956 (3) 420 (A)
Kajee v HM Gough (Edms) Bpk 1971 (3) SA 99 (N)
Autolec Ltd v Du Plessis 1965 (2) SA 243 (O)
Southern Life Association Ltd v Beyleveld 1989 (1) SA 496 (A)

6.1 INTRODUCTION: FACTUAL AND LEGAL CAUSATION

It is certain that for a successful appeal of estoppel, a causal link is required between the misrepresentation by the estoppel-denier and the eventual act to his or her own prejudice by the estoppel-asserter (*Southern Life Association Ltd v Beyleveld* 1989 (1) SA 496 (A)). As opposed to the law of delict where a strict distinction is made between factual and legal causation, our courts generally do not expressly distinguish between these two aspects of causation where estoppel is concerned. You will remember from the law of delict that factual causation, which is determined by the *conditio sine qua non* test, is concerned purely with whether prejudice or damage was indeed **caused** by the conduct of the defendant. Legal causation, on the other hand, is concerned with whether the defendant should be held **liable** for the prejudice or damage he or she caused or contributed to. The latter is thus a normative or policy question — that of the limitation of liability.

6.2 THE “PROXIMATE CAUSE” TEST

As has been mentioned, no distinction is made in cases of estoppel between factual and legal causation, but the factual and policy aspects of estoppel are combined in one test. In order to determine whether the necessary causal link between misleading and prejudice is present for estoppel, the Appellate Division has frequently decided that the test is whether the misrepresentation was the **proximate** or **real and direct cause** of the misled party’s acting to his prejudice. **Proximate cause** and **real and direct cause** are clearly regarded as synonymous. These tests were laid down authoritatively in *Union Government v National Bank of SA Ltd* 1921 AD 121 130 (the proximate cause), 138 (the direct

cause); *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) 426 A (the real and direct cause and the proximate cause).

The proximate cause test was first discussed by the Appellate Division in *Union Government v National Bank of SA Ltd*. The facts are as follows:

A postal agent and part-time government employee, P, permitted S, whom he had known for many years and whom he had no reason to distrust, to work in his office — a room on P's own premises which had been set aside as a post office — on four or five Sundays, S having told him that he wanted a quiet place in which to work. While he was in P's office, S used the post office's official date stamp, which P had neglected to keep under lock and key, to stamp a number of unused blank postal order forms which had been stolen from a post office in another town about three years before. Having given the order forms the appearance of validity by stamping them, S disposed of them to various persons. Some of these persons deposited the orders they had acquired with the bank (the respondent in the appeal). The bank presented the orders to the post office and was paid their face value. The government (appellant in the appeal), on discovering that the orders were not genuine, sought to recover under a *condictio indebiti* the amount the post office had paid to the bank. The bank set up a defence of "estoppel by negligence", alleging that P had been negligent in not keeping the date stamp under lock and key and in allowing S access to the room in which the stamp was kept.

Reversing the decision of the Transvaal court, the Appellate Division held that the government was not estopped from claiming the money the post office had paid to the bank.

The three judgments of the Appellate Division are summarised as follows in LAWSA paragraph 664:

Innes CJ decided the case on the basis that there had been no negligence on the part of P *vis-à-vis* the bank and that the government was accordingly not estopped from asserting the invalidity of the postal orders.

Solomon JA held that, even if P had been negligent (a question on which the learned judge expressed no opinion), his negligence was not the proximate cause of the bank's having been misled into believing in the genuineness of the postal orders. The learned judge held, furthermore, that even if there had been negligence on the part of P in his custody of the date stamp, such negligence was only "very remotely" connected with the payment by the bank to the depositors of the false postal orders, and that such payment was "not the necessary or ordinary or likely result" of that negligence. Payment would never have been made by the bank, the learned judge said, but for the occurrence of "the very extraordinary event" that S should have obtained possession of a number of postal order forms which had been stolen three years earlier. The "direct cause" of the bank's loss, the learned judge held, was "the intervention of an act of wickedness" on the part of S which P could not have been expected to anticipate.

The third member of the court, Juta JA, decided the case on two grounds: first, that P had not been negligent *vis-à-vis* the bank, and second, that even if there had been negligence on his part, that negligence was not the proximate cause of the bank's loss. As to the question of causation, he posed the question whether P's negligence, if any, was the proximate

cause of *damnum* to the bank, or whether it was not “too remote”, and then proceeded to hold that events which intervened between the negligence (viz. P’s failure to keep the date stamp under lock and key) and the cashing of the orders by the bank prevented that negligence from being the proximate cause of the loss of the bank.

The judgments of Solomon JA and Jura JA indicate clearly that factual and legal causation are implicit in the proximate cause test. They expressly require that the prejudice must not be **too remote** a consequence of the misrepresentation. However, the proximate cause test does not require that the misrepresentation must be the **sole** cause of the prejudice. In *Autolec Ltd v Du Plessis* 1965 (2) SA 243 (0) it is put as follows: “It is sufficient for the representee to prove that the representation was **an** inducing cause. He need not establish that it was the (sole) inducing cause” (our emphasis).

Applied literally, the proximate cause test means that estoppel cannot be invoked in cases where the estoppel-denier makes use of an intermediary, for example where the owner entrusts his property to a person whose conduct, together with his possession of the thing, misleads a third party to act to his own prejudice. However, our courts do not seem to be so “consistent”. Only where the intermediate party’s fraudulent acts are quite independent of the conduct of the owner, will the necessary causal link between the owner’s conduct and the prejudice be deemed to be absent. In such cases the conduct of the intermediary can be regarded as a *novus actus interveniens* (new intervening cause) which interrupts the (legal) causal chain of events.

The following useful summary of the legal position in this regard appears in LAWSA paragraph 665:

The application of the proximate cause test may give rise to difficult questions in cases where there are not only two parties involved, viz. the representor and the representee, but also a third, intervening person who practises a fraud on the representee, which fraud is made possible, or is facilitated, by the conduct of the representor, ie the person against whom a defence of estoppel is raised. Situations of this kind, it would seem to appear from reported decisions of the courts, arise most commonly in cases where an owner of movable property has, by permitting the property to be in the possession of another person (sometimes with accompanying documents relating to the title of the property or authority to deal therewith), provided the latter with the opportunity to represent fraudulently to an innocent person that he is the owner of the property or that he has the right to dispose of it. In such cases (depending, of course, on the facts of each case) problems may arise as to whether the fraud of the intervening party, or the conduct of the owner of the property which permitted, or facilitated, the fraud is to be considered to be the proximate, or real and direct, cause of the representee’s acting to his prejudice. It has been said that in cases of this kind the negligent conduct of the person against whom the estoppel is raised can never be the proximate cause of the representee’s having acted to his detriment because there is always interposed the misrepresentation of some third person. A reading of relevant reported cases shows, however, that the application of the test has not always resulted in a finding that the fraud of the intermediary was the proximate cause of the innocent representee having acted to his loss.

example

Thus in *Kajee v H M Gough (Edms) Bpk* 1971 (3) SA 99 (N), for example, it was held that estoppel can be raised against X where he enables Y to commit fraud for instance by negligently delivering documents regarding a car to Y. Here X should reasonably have foreseen Y's subsequent conduct.

In conclusion we must mention that Jansen AJ stated in *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 1005 that the question about which causation theory is the correct one to apply in cases of estoppel appears not to be completely settled yet.

SELF-ASSESSMENT

- (1) Are both factual and legal causation relevant for the law of estoppel? Discuss.
- (2) What test is employed by the courts to determine whether there was a causal connection between the estoppel-denier's misrepresentation and the estoppel-asserter's prejudice? Discuss in detail.
- (3) A postal agent and part-time government employee, P, permitted S, whom he had known for many years, to work in his office on Sundays because it was a quiet place in which to work. While he was in P's office, S used the official post office date stamp, which P had neglected to keep under lock and key, to stamp a number of unused blank postal order forms which had been stolen from a post office in another town about three years before. Having given the order forms the appearance of validity by stamping them, S disposed of them to various persons. Some of these persons deposited the orders they had acquired with the B bank. The B bank presented the orders to the post office and was paid their face value. The government, on discovering that the orders were not genuine, sought to recover under a *condictio indebiti* the amount the post office had paid to the B bank. The B bank raised the defence of estoppel by negligence, alleging that P had been negligent in not keeping the date stamp under lock and key and in allowing S access to the office. Discuss the merits of the defence of the B bank.
- (4) The light meter of John's camera malfunctions. John takes his camera to a camera dealer for repairs. After the technician has repaired the camera, he deliberately leaves it among second-hand cameras offered for sale. Peter buys the camera from the store. When John discovers this, he claims the camera from Peter. Peter raises estoppel. Would it be correct to state that the conduct of an intervening person — like the technician in the given facts — would always be the "proximate cause" of the misled person's prejudice? Explain.

FEEDBACK

- (1) See 6.1 and 6.2. Note that these two facets of causation are combined in a single test in the case of estoppel. The fact that the courts do not explicitly differentiate between the two facets does not therefore justify a conclusion that only one of the two is relevant for the law of estoppel.

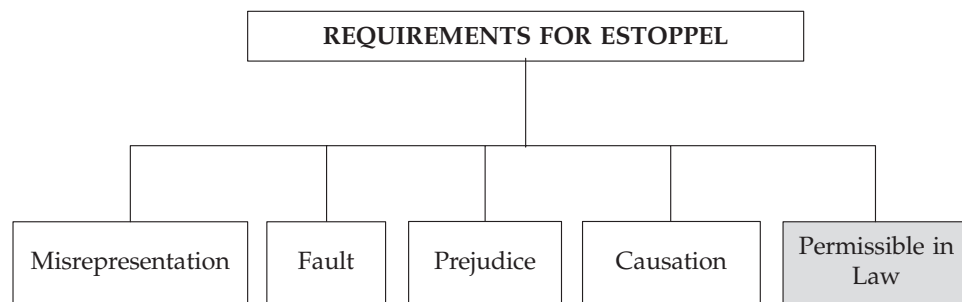
Compare the approach to causation in the law of delict. Consider whether the law of estoppel could benefit from developments in the law of delict.

- (2) See 6.2. Clarify your answer by discussing the facts of and decision in the *Union Government* case. Bear in mind that the courts are not always clear or uniform in their expression of the causation requirement.
- (3) See 6.2. Question (3) is simply another way to test your mastery of the same study material you had to use in answering question (2). Note that the facts of this question are those of *Union Government v National Bank of SA Ltd* 1921 AD 121. Note also that it was a case where estoppel was raised as a defence to an enrichment claim, that is the *condictio indebiti*. This demonstrates the overall importance of estoppel and its potential application in the law of obligations (and elsewhere).
- (4) See 6.2 (especially the quotation from LAWSA paragraph 665). This question alludes to the problematic aspect of intentional (fraudulent) conduct by a third party. Bear in mind that the position in this regard is not entirely certain and that case law does not reflect a uniform picture. Compare for instance *Union Government v National Bank of SA Ltd* 1921 AD 121 and *Kajee v HM Gough (Edms) Bpk* 1971 (3) SA 99 (N). Consider whether there is any real difference between the factual situations in these two cases. Should the outcome in both cases not have been the same? Is there merit in the approach adopted in *Kajee v HM Gough (Edms) Bpk*?

FEEDBACK: PRACTICAL SCENARIO

The scenario is based loosely on the facts of *Kajee v HM Gough (Edms) Bpk* 1971 (3) SA 99 (N) where the court actually found that estoppel could succeed in the circumstances on the basis that the intermediary's (B's) fraud was not the real or proximate cause of C being misled, but rather the negligence of the person who sold the car (A). However, you should consider all possible arguments within this context. Compare, for instance, the approach(es) adopted in *Union Government v National Bank of SA Ltd* 1921 AD 121. See also the feedback to question (4) above.

REQUIREMENTS FOR A SUCCESSFUL RELIANCE ON ESTOPPEL: THE RELIANCE ON ESTOPPEL MUST BE PERMISSIBLE IN LAW



OVERVIEW

In this study unit the last requirement for a successful reliance on estoppel is dealt with. This requirement implies that the reliance on estoppel must not be prohibited by the law.

PRACTICAL SCENARIO

A applies to the local authority for a licence to trade. The relevant committee of the local authority decides against granting the licence on certain grounds. The clerk who issues the licences mistakenly issues a trade licence to A. Once the local authority discovers this mistake it immediately informs A that his licence has been revoked because it should not have been granted in the first place. A contests the revocation and invokes estoppel against an application by the local authority to have the licence revoked. Will A be successful?

SELF-EVALUATION GOALS

After completing this study unit you should be able to

- explain in general the requirement that the reliance on estoppel must be allowed by law
- explain the requirement that the reliance on estoppel must be allowed by law with reference to illegal or invalid acts and give examples from case law
- explain the requirement that the reliance on estoppel must be allowed by law with reference to *ultra vires* acts and give examples from case law
- explain the requirement that the reliance on estoppel must be allowed by law with reference to status and legal capacity and give examples from case law
- explain how this requirement has been applied by the South African courts in the area of hire-purchase transactions (credit agreements)

PRESCRIBED CASE LAW

None

ADDITIONAL READING MATERIAL (OPTIONAL)

Rabie *LAWSA* par 673–676
 Rabie & Sonnekus 167–189
 Visser & Potgieter 307–344
 Nienaber “Tets oor verdiskontering, estoppel en borgtog” 1964 *THRHR* 262
 Selvan “Discounting estoppel and suretyship — a divergent view” 1965 *THRHR* 231
 Nienaber “Nogmaals verdiskontering en estoppel” 1966 *THRHR* 51
Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of SA 2000 (2) SA 674 (CC)
City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd 2008 (3) SA 1 (SCA)
Trust Bank van Afrika (Bpk) v Eksteen 1964 (3) SA 402 (A)
Trust Bank van Afrika (Bpk) v Van der Walt 1962 (1) SA 174 (T)
Hoisain v Wynberg Municipality 1916 AD 236
Fuls v Leslie Chrome (Pty) Ltd 1962 (4) SA 784 (W)
Hauptfleisch v Caledon Divisional Council 1963 (4) SA 53 (C)
Autolec Ltd v Du Plessis 1965 (2) SA 243 (O)
The Credit Corporation of SA v Botha 1968 (4) SA 837 (N)
Strydom v Die Land- en Landboubank van Suid-Afrika 1972 1 SA 801 (A)
Klerck NO v Van Zyl and Maritz NNO 1989 (4) SA 263 (SE)
Naidoo v Marine & Trade Insurance Co Ltd 1978 (3) SA 666 (A)

7.1 INTRODUCTION

Estoppel is a particular form of relief by which a false impression is upheld as the truth. Though not usually mentioned as a separate prerequisite for estoppel, it stands to reason that estoppel can operate only where the false impression that has been created, can in fact be legally upheld. Where the upholding of an impression by means of estoppel results in a situation prohibited in the public interest, by common law or by statutory law, estoppel obviously cannot be available as a remedy. Although that seems simple enough, this requirement has caused problems in certain contexts, as will be seen.

7.2 ILLEGAL OR INVALID ACTS

general approach Where a specific act is forbidden or prescribed in the general interest, the false impression that the forbidden act has been committed, or that the prescribed act has not been carried out, cannot support a plea of estoppel, since this would mean that an unlawful result (the transgression of a prohibition or the non-execution of a command) is brought about by upholding a false impression.

example Thus it has been decided that where the use of a totalisator is prohibited by a statute, estoppel cannot be employed to confirm the use of the totalisator (cf *Brady v SA Turf Club* 23 SC 385; *Neale v East London Municipality* 1913 EDL 297). Similarly, where a municipality has for a certain period failed to collect rates in accordance with the prescribed correct computation as is its duty in terms of a statute, estoppel cannot assist anyone who has been thus misled, to escape eventual payment (see *Long v Cape Town Municipality* 1925 CPD 127).

example If a trade licence is wrongly issued to a merchant in spite of an express resolution to the contrary by the authorised body, the maintenance of the false impression created thereby will enable the trader to ply his of her trade contrary to the statute prohibiting such conduct except where it is done with the necessary permission. Therefore, in such circumstances, the doctrine of estoppel cannot be applied (*Hoisain v Wynberg Municipality* 1916 CPD 194, 1916 AD 236).

In *Fuls v Leslie Chrome (Pty) Ltd and Another* 1962 (4) SA 784 (W) at 787, the following is stated:

Estoppels cannot prevail if such would result in the nullification of a statute. Here too a statute has clearly laid down that for the lease to be valid it must conform to certain formal requirements. That obviously was enacted on grounds of general public policy. There is accordingly no room for an equitable principle that would seek to nullify the effect of the statute.

example Therefore, if A should confirm to C that he (A) has granted B a written option to purchase his (A's) farm, and on the strength thereof C should take cession at a price of B's option, C will not be able to raise estoppel should it transpire that the option that C purports to exercise was in fact granted orally. Nor does this apply to statutory provisions alone. If A owes B money based on an unlawful cause (eg a brothel debt) and B cedes this "debt" as a valid claim to C under circumstances where A creates the impression that it is indeed a valid claim, in effect maintenance of the false impression against A will entail the enforcement of an unlawful debt.

In short, the principle is as stated in *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C):

The effect of the estoppel claimed by the appellant will be to create a state of affairs which respondent is not legally empowered to create. The estoppel would thus give rise to an illegality. This the law does not permit.

(See also *Western Credit Ltd v Mike Kopping's Truck Centre (Pty) Ltd* 1966 (2) SA

387 (T); *OK Bazaars (1929) Ltd v Universal Stores Ltd* 1973 (2) SA 281 (C) at 290 E–F; and *Durban City Council v Glenore Supermarket and Café* 1981 (1) SA 470 (D).)

Consider in this regard *Strydom v Die Land- en Landboubank van Suid-Afrika* 1972 (1) SA 801 (A) at 815G, where the following passage in *Spencer Bower* 140 is cited:

Nor can the lack of such essential formalities as the consent of a Minister of the Crown or the making of a contract under seal or other particular formalities prescribed by statute, be remedied by estoppel, when the statute has made them the necessary conditions of entering into the transaction.

(See also *Plascon Evans v Virginia Glass Works* 1983 (1) SA 465 (C))

exception

On the other hand, estoppel **is applicable** where the maintenance of a false impression would perpetuate a situation which is merely contrary to the policy consistently applied by a competent body without its being in conflict with any statutory decree or prohibition.

example

In *Mossel Bay Municipality v Ebrahim* 1952 (1) SA 567 (C) a local authority mistakenly and in conflict with its long-standing policy granted a trade licence in respect of certain areas. When, thereafter, it attempted to cancel the licence, the court held that the local authority could not say in response to a plea of estoppel that, if upheld, estoppel would have the effect of compelling it to do something beyond its powers, or refrain from doing that which it was its duty to do. Van Winsen J concluded: “It seems to me that where no statutory prohibition would be violated or duty left unfulfilled by reason of the operation of estoppel, the local authority must be held bound to its decision.”

7.3 ULTRA VIRES ACTS

It follows from the preceding discussion that Estoppel is not available to allow a statutory body to commit an act which is *ultra vires* the powers of such body. A statutory body has such powers and duties as are conferred by statute and it cannot be bound by estoppel to do something beyond its powers or be prevented from something which it has the duty do. The same principle applies to individuals regarding powers and duties conferred upon them by law.

The following are some of the examples mentioned in *LAWSA* paragraph 675:

example

Thus it has been held that where a town clerk in error, which meant without the authority of the municipal council, issued a certificate to trade on the strength of which a general dealer’s licence was issued by the revenue authorities, he was not estopped from refusing to put the name of the person concerned on the list of general dealers for the area concerned, the reasoning being that he could not by his mistake be compelled to bring about a position which he had no power in law to create by his own free will [see *Hoisain v Wynberg Municipality* 1916 CPD 194 198]. It has been held — to cite a few more illustrations — that a town councillor who had voted in favour of a resolution which was *ultra vires* of the municipality was not estopped from subsequently challenging the validity of action taken in pursuance of the resolution [see *Maberly v Woodstock Municipality*

1901 SC 443]; that a pension fund organisation was not estopped from asserting that a contract entered into by it was *ultra vires* of the organisation [see *Abrahamse v Connock's Pension Fund* 1963 2 SA 76 (W)].

In this regard a distinction must be drawn between acts which are *ultra vires* of a statutory body and those which are within such body's powers if done after some internal formalities have been complied with. In the latter type of case persons dealing with the body may, in the absence of knowledge to the contrary, assume that all the necessary formalities have been complied with, and may plead an estoppel if the defence is raised that the necessary formalities were not complied with (see *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* [2007] 3 All SA 17 (SCA)).

The Constitution of the Republic of South Africa, 1996 has added a further dimension to this issue, which is concisely dealt with in LAWSA paragraph 675 as follows:

The Constitution has, however, altered the context in which the doctrine of estoppel by representation in terms of public law is to be viewed. There is now a constitutional imperative to ensure that the common law evolves within the framework of the Constitution consistent with the basic norms of the legal order that it establishes. It has been stated that instead of focusing solely upon the nature of the statutory duty, the court should be entitled to balance the competing interests at stake and take into account factors such as the prejudice to the party seeking to raise the estoppel. Instead of a blanket barrier to the raising of estoppel the common law should be developed to emphasise the equitable nature of the remedy, its function as a rule allocating the incidence of loss and flexibility in taking into account what is right, just and fair in the circumstances [See *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of SA* 2000 (2) SA 674 (CC)]. The proper approach, consistent with section 39(2) of the Constitution, is that the court should balance the individual and public interests at stake and decide on that basis whether the operation of estoppel should be allowed in a specific case [See *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W)].

As the result there *may* be instances where, after due consideration of the interests at stake, a statutory body is held bound in terms of estoppel to do something which is *ultra vires* its powers. We shall see in future, however, to what extent the courts will be prepared to deviate from the established approach in this regard.

7.4 STATUS AND LEGAL CAPACITY

Estoppel cannot be applied in such a way as to give effect to what is not recognised or permitted by law. Therefore, estoppel cannot be used if its effect would be to confer on a person or thing a status, legal capacity or jurisdiction which the person or thing does not in law possess (LAWSA par 676).

example

For example, in an earlier case it was held that where a married woman does not have the necessary capacity to enter into a contract, estoppel cannot operate to remedy such a lack of capacity (see *Rand Wholesale Outfitters v Cassels* 1955 (2) SA 66 (W)). Similarly, in a case where a company had not been incorporated and registered in terms of the Companies Act 61 of 1973 at the time when it entered into a contract, the court found that the company could not be estopped from saying that it had no legal existence at the relevant time and that it could not be held to any representation made by itself or any person regarding its status (see *Trust Bank of Africa Ltd v Appletime Engineering (Pty) Ltd* 1981 (1) SA 374 (D)). In the case of a minor who falsely represents that he has contractual capacity, it would also seem that he cannot be held liable on such contract by means of estoppel — except in so far as he has already performed, since he cannot recover such performance — but that he is delictually liable to compensate any actual damage suffered by the other party (see *Louw v M J & H Trust* 1975 (4) SA 268 (T)).

7.5 HIRE-PURCHASE CONTRACTS (CREDIT AGREEMENTS)

7.5.1 Introduction

The application of the principles discussed above in the case of hire-purchase contracts (credit agreements) in terms of the now repealed Hire-Purchase Act 36 of 1942 frequently received the attention of our courts. It must be kept in mind that this Act was later replaced by the Credit Agreements Act 75 of 1980 with effect from 2 March 1981 (the Credit Agreements Act was read in conjunction with the Usury Act 73 of 1968), which in turn has been replaced by the National Credit Act 34 of 2005. The National Credit Act was gradually enacted, commencing on 1 June 2006, and came into full operation by 1 June 2007 (the National Credit Act must be read in conjunction with the Regulations promulgated in terms thereof). The revoked Hire-Purchase Act applied to hire-purchase contracts entered into before 2 March 1981, while the repealed Credit Agreements Act (and Usury Act) continued to apply until 1 June 2007. The court decisions regarding the application of estoppel to hire-purchase contracts are somewhat problematic and are discussed in this study guide. It may also be assumed that the principles reflected in these decisions apply *mutatis mutandis* to the new legislation, except in so far as the nature of the new legislation clearly renders them inapplicable. However, there have not been recent decisions and it seems unlikely that the problems discussed below will persist.

Theoretically a plea of estoppel ought **not** to succeed under the following circumstances:

example

A purchased a motorcar from B in terms of a contract regulated by the Credit Agreements Act. A did not make the necessary initial payment prescribed by the Act in section 6. This can of course only occur with the assistance of B. On the purchase forms the impression is given that the prescribed payment has in fact been made. Now B discounts the contract with C (the discounter). A must pay all further instalments to C. A ceases his payments and C sues him on the ground of the discounted contract. A pleads that the contract is void because he did not make the payment prescribed by the Act. C raises estoppel. He wishes to hold A to the appearance that he created by giving the

impression on the signed document that he had made the necessary payment. (Here you must keep in mind that B — the seller — was also a party to the fraud, but on the basis of these facts C can only claim from A payment of the instalments due in terms of the contract and estoppel can be raised only against A.)

As stated earlier, on general principles this plea of estoppel by C ought not to succeed, because if it succeeds, the contract will be kept in force, although the Credit Agreements Act forbids it. The appearance should not be upheld, because it would promote an unlawful result.

This is the theoretical position in the discounting of hire-purchase agreements. However, the courts dealt with the matter in a way differing fundamentally from the position as explained above. On the basis of what follows, you will note that the legal position in the discounting of credit agreements must be regarded as an exception to the general rule of estoppel, namely that the upholding of the appearance must not promote an unlawful result.

In the cases which will now be discussed, the Hire-Purchase Act was applied and the terminology of that Act will be used.

7.5.2 Hire-purchase transactions in case law

Since it is doubtful whether or to what extent the problems previously encountered will apply to the National Credit Act 34 of 2005, you should read this section carefully, but you do not have to study it.

The Trust Bank of Africa Ltd v Malan

In the case of *The Trust Bank of Africa Ltd v Malan* 1961 (1) PH A 37 (T), A “bought” a motorcar on hire-purchase from B. The whole idea was that A did not really wish to enter into a contract with B, but that he wished to finance himself. The hire-purchase agreement was discounted with C and C sued A for payment in terms of the hire-purchase agreement. A pleaded that the whole transaction was void and that therefore he was not liable. The discounter C raised a successful plea of estoppel.

In the case A argued that C could not raise estoppel because it would promote an unlawful result. However, the court decided in regard to this argument that no contract had been entered into by A and B and that, accordingly, there had been no invalid contract to which effect would have been given had estoppel succeeded.

In the course of the judgment the judge noted (at 37):

The answer to this submission (that estoppel cannot be raised, because that would promote an unlawful result) seems to me to be that the documentation in question never was intended to and never did in fact cover a true transaction of sale; no motor-car was ever sold at that time and therefore no question arises as to the validity or legality of any transaction involving the sale of a motor-car or any article. The upholding of estoppel in this case would not result in any illegality; nor would it result in something which is not countenanced by the Hire-Purchase Act.

The Trust Bank of Africa v Van der Walt

In the case of *The Trust Bank of Africa v Van der Walt* 1962 (1) SA 174 (T), two brothers (A) signed blank hire-purchase forms with B in terms of an arrangement by which they would buy a lorry from B on hire-purchase. The

whole transaction was made conditional upon the success of A's crops. Meanwhile, B completed the hire-purchase forms (ie he created the impression that a valid hire-purchase agreement had been entered into) and he discounted these forms with C. C sued A (whose crops had failed) on grounds of the discounted "hire-purchase agreement". When A pleaded that no valid hire-purchase agreement existed between himself and B, C raised estoppel.

Here, too, the question is whether a plea of estoppel, should it succeed, would not have promoted an illegal result. The court did not find it necessary to deal with this problem, since it was found that no representation had been made by A.

Trust Bank van Afrika (Bpk) v Eksteen

The entire matter was again raised and discussed in the well-known case of *Trust Bank van Afrika (Bpk) v Eksteen* 1964 (3) SA 402 (A). The Appeal Court's judgment in this case is the leading decision on the question whether estoppel can be raised where it would promote an illegal result. Note an important difference between this case and the cases discussed above: In the *Eksteen* case action was taken against the **hire-purchase seller** and not against the hire-purchase buyer. In the *Eksteen* case the hire-purchase seller bound himself to the discounter by means of a contract of suretyship, in which the seller stood good for the proper fulfilling of the hire-purchase buyer's duties against the discounter in terms of the discounted hire-purchase agreement.

Thus, apart from the *vinculum juris* (obligation) between the discounter and the buyer, there is also in this case a *vinculum juris* in the form of a contract of surety between the seller and the discounter. The seller gave the discounter the impression in this case the contracts were in order.

In casu the discounter claimed the outstanding balance in terms of the hire-purchase agreements from the hire-purchase **seller** in terms of the contract of suretyship between them. The hire-purchase seller raised the nullity of the hire-purchase contracts as defence (because payment of the deposit required by statute had not been made), which also resulted in the nullity of the suretyship. The discounter pleaded estoppel against this.

In the judgment of the court *a quo* of the Natal Provincial Division (1964 (1) SA 74 (N)), two questions were distinguished:

- (1) The argument that the required deposit had not been paid resulted in the original hire-purchase contracts' being null and void. The first question was whether estoppel could be raised to enforce the void hire-purchase agreements. It was argued that a negative answer should prevail because a plea of estoppel would result in a wrongful outcome. The "claim" (personal right) in terms of the hire-purchase contract thus also remained null and void and could not be enforced by means of estoppel. If it was found that the hire-purchase agreements were void, it could be argued that the contract of suretyship was also void, because the liability of the surety was accessory to the main debtor's liability.
- (2) Since the surety implied to the discounter that the hire-purchase contracts were in order, a further question had to be answered, namely whether the surety could not be held to be bound to the impression he had created (namely that he was liable as surety) on the grounds of estoppel **regardless** of the nullity and unenforceability of the original hire-purchase contracts.

Nienaber (1964 *THRHR* 264) summarises this as follows:

The pertinent (first) question to be decided was whether estoppel had a part to play in the case of prohibited contracts or acts. Stated differently: Would estoppel be a good answer to a denial of liability on the part of the main debtor? This is the primary question. If the answer is in the affirmative, the main debtor is personally liable and then it goes without saying that the surety is liable too — and that will be the end of the matter. However, if the answer to the primary question is in the negative, it implies that the main debtor is not liable and then the further question arises whether estoppel is a good defence against a denial of liability on the part of the surety. (Our translation.)

In the Natal court (1964 (1) SA 741 (N)) it was decided that in neither of the two cases mentioned above could estoppel be raised by the discounter. The court ruled expressly that estoppel could not be raised because to allow estoppel would promote an illegal result:

Where the legislator has, upon general principles of public policy, forbidden the doing of an act or imposed a duty upon a public body or individual or has declared certain acts to be null and void or of no force and effect, the object of the legislator cannot be permitted to be stultified by the private conventions of the parties to a particular action or by a mistake, be it negligent or otherwise, of the party on whom the statutory duty rests or against whom the statutory prohibition operates or of the parties who purport to perform the act made null and void or of no force and effect.

This Natal decision was then taken on appeal. The Appeal Court decided the case by considering the argument mentioned under (2) (above). It was decided that the surety could be estopped on the grounds of the impression created (in the contract of surety), namely that the discounted hire-purchase agreements were all in order.

The Appeal Court expressly pointed out that in this case one had to do with different contracts.

It is important to note that the Appeal Court did not specifically deal with the question whether estoppel can also be raised against the buyer, thereby giving effect to the invalid hire-purchase agreements. The point made under (1) was not decided by the Appeal Court.

We are dependent on the other *dicta* in the decision to answer this question:

The majority decision of Steyn CJ and of Botha JA, Wessels JA and Van Wyk JA gives the following guidelines:

- Section 7(1) of the Hire-Purchase Act must be interpreted in such a way that in cases where it is not complied with, the buyer and the seller are never contractually bound to each other.
- The legislator never intended an innocent third party (in the case of a contract of suretyship) to be prohibited from raising estoppel and, in accordance with general principles, estoppel ought to succeed where there is a contract of suretyship since this does not mean that the provisions of the Hire-Purchase Act are obviated (413):

However, I cannot assume that the legislature in section 7(1) intended the validity requirement to be used to bar an unsuspecting third

person from raising estoppel, thereby placing such a person in the same position as one who wishes to defeat the intention of the legislature. It appears to me that the estoppel raised by the appellant cannot be excluded by the mentioned principles in a case of this nature. (Our translation.)

- Steyn CJ then also intimates that there are no definite principles in our legal practice in accordance with which parties can prevent a third party from raising estoppel by appealing to the illegality of the agreement between them (at 413).
- By reason of these *dicta* of the Appeal Court (above), Nienaber (above) is of the opinion that it appears that a discounter can also raise estoppel against the hire-purchase **buyer**, even if it creates an invalid result.

In the light of the later decisions (see below) it would appear that the courts have also interpreted the views of the Appeal Court in this manner.

The decision of the Appeal Court caused comment and Nienaber also argued that the *dicta* in the decision were contrary to the general principle that the upholding of the impression should not promote an illegal result.

Selvan (1965 *THRHR* 231) is of the opinion that the Chief Justice could never have had the intention of implying that the discounter could also raise estoppel against the **purchaser** and that Nienaber had interpreted the *dicta* incorrectly.

Hoexter AJA delivered a separate judgment (at 415). His conclusion is the same as that of the majority decision, but his arguments are different. He states that the test to determine whether estoppel can be raised or not does not lie solely in the question whether estoppel promotes an illegal result or not, but rather in taking all factors into consideration:

The doctrine of estoppel is an equitable one, developed in the public interest, and it seems to me that whenever a representor relies on a statutory illegality, it is the duty of the court to determine whether it is in the public interest that a representee should be allowed to plead estoppel.

After the *Trust Bank v Eksteen* judgment was delivered, other judgments followed and in them we find an application of the principles laid down by the Appeal Court.

These judgments generally indicate that the plea of estoppel by the discounter against the **hire-purchase buyer** must be upheld in spite of the fact that effect is then given to an invalid act.

further decisions

The following decisions came after the *Eksteen* case:

- (1) In *The Scottish Rhodesian Finance Corporation Ltd v Olivier* 1965 (2) SA 716 (R) the Rhodesian Appeal Court intimated that a plea of estoppel ought not to be successful where the upholding of the impression will promote an illegal result.
- (2) In *Autolec Ltd v Du Plessis* 1965 (2) SA 243 (O) the Free State court arrived at a different conclusion. Here A entered into fictitious hire-purchase contracts with B, in terms of which he bought two motorcars from B. The seller never had the intention of selling any motorcars and, furthermore, no motorcars could be delivered and no amount of money was paid by the buyer. The buyer knew that the seller intended

discounting these contracts with a third party and implying that they were proof of a real transaction. Seller B did not discount these contracts with the intended third party but the contracts were, in fact, discounted with C (the plaintiff). C had a claim against B on the grounds of previous dealings and as a condition of the settlement between C and B, it was agreed between them that B would cede the hire-purchase agreements to C. When C claimed payment from A on these hire-purchase agreements, A pleaded that they were fictitious contracts and C raised estoppel. The plea of estoppel was upheld.

In the course of the judgment Hofmeyer J held that the Appeal Court “recognizes the validity of claim by an innocent discounter in the circumstances applicable in the present case”.

- (3) In *the Credit Corporation of SA Ltd v Botha* 1968 (4) SA 837 (N) the facts were briefly the following: A entered into a hire-purchase agreement with B, in terms of which he bought a caravan from B. This agreement was discounted with the National Industrial Credit Corporation (NICC). At a later stage A wished to purchase a motorcar from B. Because A did not have the necessary cash to pay a deposit, B hatched a scheme in terms of which A entered into a second “hire-purchase agreement” with him, replacing the original agreement. In accordance with this second “hire-purchase agreement”, the same caravan was again sold to A by B. Meanwhile NICC was still the owner of the caravan in terms of the discounting of the first hire-purchase contract. A thus already had all the rights in terms of the first hire-purchase contract, which rights now apparently became his in terms of the second contract. The intention was that the yield from the discounting of the second hire-purchase agreement would be used, partly to pay the rest of the instalments of the first hire-purchase agreement, and partly as a deposit on the motorcar that was bought on an open account (ie an ordinary credit sale). From the facts it must be clear that the second agreement was a fictitious one, since in terms of it A bought something which he already had. This second (fictitious) agreement was not discounted with the NICC but with C (the plaintiff). When A stopped making his payments, he was summonsed by C and A pleaded that the agreement between himself and B was void. C raised estoppel. The magistrate’s court held that C could not raise estoppel, but in the Natal Provincial Division the plea of estoppel succeeded. It was argued on behalf of A that C could not raise estoppel because the upholding of the impression would promote an illegal result. The judge relied on the minority judgment of Hoexter AJA in the *Trust Bank* case (1964 (3) SA 402 (A) 415), where he stated:

The doctrine of *estoppel* is an equitable one, developed in the public interest, and it seems to me that whenever a representor relies on a statutory illegality, it is the duty of the court to determine whether it is in the public interest that the representor should be allowed to plead estoppel.

On pages 851–852 of the report the Natal court expressly found that estoppel could be raised in the particular circumstances:

While in this matter the statute was designed to protect purchasers against their own indiscretion, it was not designed to protect them against persons

innocent to the illegality, and the appellant (was) innocent of it. In my judgment there is no consideration of public policy which operates against the application of estoppel in the present circumstances.

7.5.3 Conclusion

You must study this section. Refer to 7.5.2. if some of the aspects discussed below are unclear to you.

distinction between fictitious and invalid hire-purchase agreements

Apparently our courts draw a distinction between fictitious and invalid (void or illegal) hire-purchase agreements. In the case of the **fictitious** hire-purchase agreements, no obligations actually come into existence between the parties, since they did not have the intention to enter into any contract. This is the case, for example, where the “seller” and the “buyer” collaborate to finance the one party. Examples of this type of fictitious contract are to be found in the *Maharaj*, *Malan*, *Autolec* and *Credit Corporation* cases above. In the case of the **invalid** hire-purchase agreements the buyer and the seller do intend to buy and sell and an article is in fact sold and delivered. However, because the parties do not comply with the legal requirements, for example because the initial payment (deposit) required is not made by the purchaser of a motorcar, the contract is invalid. Examples of this type of transaction are to be found in the *Eksteen* and *Scottish Rhodesian* cases above.

Nienaber (1964 *THRHR* 262) apparently also makes this distinction when he cites two general sets of facts on 262. Selvan also points out the difference between void and fictitious contracts (1965 *THRHR* 234).

In the case of the fictitious hire-purchase agreements, the courts unequivocally stated that the “buyer” is liable. Apparently the idea in these cases was that there was no sidestepping of the stipulations of the Hire-Purchase Act. Compare in this regard the judgment of Galgut J in the *Malan* case above.

The Appeal Court also stated the following in the *Trust Bank* case (Steyn CJ):

I must add that some of the alleged hire-purchase contracts are fictitious contracts according to the pleadings. They are contained in false documents reflecting imaginary transactions, and can therefore not be affected by the prescribed validity requirements (of the Hire-Purchase Act). In so far as (these fictitious contracts) are concerned, a reliance on estoppel can in any case not be excluded on the given grounds. (Our translation.)

Nienaber criticises the point of view that estoppel can be raised in the case of fictitious hire-purchase agreements, because according to him, this would mean that in the first place the fictitious hire-purchase agreement is made real and in the second place non-compliance with the deposit requirement in the case of construed hire-purchase agreements is condoned.

Nevertheless, estoppel can be raised against the **buyer** by the innocent discounter in the case of **fictitious** hire-purchase agreements (see for example the *Malan*, *Maharaj*, *Autolec* and *Van der Walt* cases and the *dicta* in the *Eksteen* case). Though there is still a certain degree of uncertainty about whether the discounter can raise estoppel against the hire-purchase buyer where the contract is **invalid**, it would appear that positive law now determines that it can

be raised. The arguments of writers like Nienaber and Selvan who state that to raise estoppel under these circumstances should not be possible, are apparently not supported by the Appeal Court in the *Eksteen* case. The only decision which really supports the arguments of these writers is the *Scottish-Rhodesian* case (a decision of the Rhodesian appeal court).

From the above points it can be concluded that in respect of the discounting of hire-purchase agreements there is an exception to the general rule, namely that the upholding of an impression must not promote an illegal result. Juridical justification for this exception must apparently be sought in the idea that public policy demands that an innocent discounter be protected, rather than that the party who has entered into the fictitious agreement or who has knowingly been a party to an illegal hire-purchase agreement benefit from his own fraud by relying on the invalidity or illegality of the contract.

This approach of the courts in regard to the doctrine of estoppel has given rise to criticism, *inter alia* because it leaves the door open for parties to enter into invalid hire-purchase agreements to which legal consequences are nevertheless attached as a result of the application of the doctrine of estoppel.

SELF-ASSESSMENT

- (1) Explain the requirement that the reliance on estoppel must be allowed by law and elucidate your explanation with several examples.
- (2) Give examples from case law where a reliance on estoppel would have brought about a result prohibited by common law or statutory law.
- (3) Can a reliance on estoppel result in an *ultra vires* act being valid? Discuss.
- (4) Can a reliance on estoppel result in the validation of an act performed in the absence of capacity to act or contractual capacity?
- (5) How have the South African courts applied the requirement that the reliance on estoppel must be allowed by law, in the area of hire-purchase transactions (credit agreements)? Discuss.

FEEDBACK

- (1) See 7.1 and 7.2. Have you considered whether this is a rule of general application? Compare, for instance, the requirement that the conclusion of a contract, its performance and its object must be lawful before it will be enforced by a court of law.
- (2) See 7.2. Have you noted that most of the examples relate to a statutory enactment that has not been complied with? Try to think of examples where estoppel would not be allowed because it would cause a situation prohibited in terms of common law.
- (3) See 7.3. In this regard you should pay careful attention to the possible implications of the Constitution. Consider a possible situation where you think the Constitution could cause an exception to the general rule in this regard.

- (4) See 7.4. Try to think of further examples where a reliance on estoppel cannot result in the validation of an act performed in the absence of capacity to act or contractual capacity.
- (5) See 7.5. Bear in mind that although this situation was highly problematic under the repealed Hire-Purchase Act, it is doubtful whether it will persist in future. Remember to pay attention to the nature of the problem (see 7.5.1) and the comments under 7.5.3 (especially the distinction between fictitious and invalid hire-purchase contracts).

FEEDBACK: PRACTICAL SCENARIO

The scenario is based loosely on the facts of *Hoisain v Wynberg Municipality* 1916 CPD 194 198, wherein it was held that where a town clerk without the authority of the municipal council issued a certificate to trade, he was not estopped from refusing to put the name of the person concerned on the list of general dealers for the area concerned, the reasoning being that he could not by his mistake be compelled to bring about a position which he had no power in law to create of his own free will. However, such a situation must be contrasted with the instance where the maintenance of a false impression would perpetuate a situation which is merely contrary to the policy consistently applied by a competent body without its being in conflict with any statutory decree or prohibition. In the latter case estoppel is applicable (see *Mossel Bay Municipality v Ebrahim* 1952 (1) SA 567 (C) discussed under 7.2 above). Remember that the distinction between these two scenarios is of cardinal importance in determining whether estoppel will succeed or not. Have you considered the implications for the law of contract? Consider the case of *National and Overseas Distributors Corp (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A). Would estoppel have succeeded if pleaded by the contract-asserter in that case? (See 8.5 in study unit 8.)

THE APPLICATION OF ESTOPPEL IN CERTAIN PRACTICAL INSTANCES

OVERVIEW

In the previous study unit the last requirement for a successful reliance on estoppel was dealt with. In this study unit we discuss the application of estoppel in certain practical instances, namely: (1) estoppel and the *rei vindicatio*; (2) estoppel and representation in terms of mandate; (3) estoppel and partnership; (4) estoppel and the conclusion of a contract; and (5) estoppel and waiver of rights.

PRACTICAL SCENARIOS

- Scenario 1 A, the owner of something, represents to C that B is the owner and acting on this representation, C buys it from B. If C alienates the thing to D, would A be able to claim the thing from D with the *rei vindicatio*?
- Scenario 2 X, a partner in a business, resigns from the partnership. Y provides goods and extends credit to the partnership because X is a good businessman and very wealthy. Owing to poor management, the partnership is soon in dire financial straits after X's departure. Y is not aware of the fact that X has left the partnership and continues to provide goods on credit to the partnership. When the partnership cannot settle his account, Y looks to X for payment. Can X be held liable for debts of the partnership incurred after his departure?
- Scenario 3 In a letter H offers a trailer to S for sale for R50 000,00. The matter is referred to a department of S which has no knowledge of the price asked by H. The department is prepared to pay R30 000,00, and writes a letter to H undertaking to buy the trailer but negligently fails to mention any price. Did a contract come into being? If so, on what terms?

SELF-EVALUATION GOALS

After completing this study unit you should be able to

- discuss in detail the effect of a successful reliance on estoppel in situations where estoppel is raised as a defence against the *rei vindicatio*
- briefly explain the two most important applications of estoppel to the field of representation in terms of mandate
- briefly explain the contribution of estoppel to the field of the law of partnership
- explain whether estoppel has any part to play in causing contracting parties to be held bound in the absence of consensus

- explain very briefly the part played by estoppel in the case of waiver of rights

PRESCRIBED CASE LAW

Van Ryn Wine and Spirit Co v Chandos Bar 1928 TPD 417

ADDITIONAL READING MATERIAL (OPTIONAL)

Estoppel and the rei vindicatio

Rabie & Sonnekus 197–204

Visser & Potgieter 34–48

Louw “Estoppel en die rei vindicatio” 1975 *THRHR* 218

Lubbe “Estoppel, vertrouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreë” 1991 *TSAR* 1

Van der Merwe “Nemo plus iuris” 1964 *THRHR* 300

Van Heerden “Estoppel: ’n Wyse van eiendomsverkryging?” 1970 *THRHR* 19

Van der Walt “Die beskerming van die bona-fide-besitsverkryger: ’n vergelyking tussen die SA en Nederlandse reg” *JC Noster Gedenkbundel* 73

Van der Walt & Pretorius “Verkoping deur ’n verkoopsagent en faktor as verweer teen die *rei vindicatio*” 1989 *TSAR* 625

Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes 1978 (4) SA 48 (C)

Barclays Western Bank Ltd v Fourie 1979 (4) SA 157 (C)

West v Pollak & Freemantle 1937 TPD 64

Estoppel and representation in terms of mandate, and estoppel and partnership

Visser & Potgieter 286–303

Strachan v Blackbeard & Son 1910 AD 282

Monzali v Smith 1929 AD 382

Haddad v Livestock Products Central Ltd 1961 (3) SA 362 (W)

Service Motor Supplies Ltd v Hyper Investment Pty Ltd 1961 (4) SA 842 (A)

Connock’s (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk 1964 (2) SA 47 (T)

Rosebank Television & Appliance Co Ltd v Orbit Sales Corp Pty Ltd 1969 (1) SA 300 (T)

Southern Life Association Ltd v Beyleveld 1989 (1) SA 496 (A)

Thompson v Voges 1988 (1) SA 691 (A)

Boonzaaier v Kiley 1981 (2) SA 618 (W)

Estoppel and the conclusion of a contract, and estoppel and waiver of rights

Rabie & Sonnekus 194–196

Visser & Potgieter 48–54

De Wet & Van Wyk *Die SA Kontraktereg en Handelsreg Volume I Kontraktereg* 5 ed 9–31

Joubert *General Principles of the Law of Contract* 77–85

George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A)

Du Toit v Atkinson’s Motors Bpk 1985 (2) SA 893 (A)

Peri-Urban Areas Health Board v Breet 1958 (3) SA 783 (T)

Poort Sugar Planters (Pty) Ltd v Minister of Lands 1963 (3) SA 352 (A)
Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd 1963 (1) SA 632 (A)
Bacon v SAR & H 1925 CPD 261
Mahabeer v Sharma 1985 (3) SA 729 (A)
Saambou-Nasionale Bouvereniging v Friedman 1979 (3) SA 978 (A)
Barclays Western Bank Ltd v Fourie 1979 (4) SA 157 (C)

8.1 INTRODUCTION

Certain general requirements for a successful reliance on estoppel were discussed in the first part of this study guide. This study unit will examine further principles which regulate the practical application of this remedy in certain instances. The practical cases which will be discussed do not represent an exhaustive survey of instances where estoppel may be applicable; they serve only as examples. The discussion which follows must be read taking into consideration the principles which have already been dealt with.

8.2 ESTOPPEL AND THE *REI VINDICATIO*

In our law the owner's claiming of his or her property which is in the hands of another by means of the *rei vindicatio* is based on the Roman principle of *ubi rem meam invenio ibi eam vindico* (where I find my property, that is where I claim it). The Germanic principle of *mobilia non habent sequelam* (movables cannot be pursued) — which would mean that an owner cannot reclaim his or her property if he or she has surrendered possession **voluntarily** — does not limit the owner's *rei vindicatio* in our law.

However, an owner's *rei vindicatio* may be restricted where he or she entrusts his or her property to a **factor** (an **agent for sale**) for selling, and the factor, exceeding the bounds of his or her authority, sells the goods. The owner can reclaim his or her property with the *rei vindicatio* only if the buyer has connived with the factor to defraud the owner. (A factor is a mandatory who sells goods entrusted to him or her by the mandator in his or her own name, at a commission.) However, in *Pretorius v Loudon* 1985 (3) SA 845 (A), doubt was expressed about the question whether this exception applies in our law.

The application of the doctrine of estoppel in cases where an owner culpably misrepresents that another person is the owner of what is in fact his or her property, or that another person is entitled to dispose of the property (*ius disponendi*), and where this person in fact sells and delivers the property to a third party, forms a further important limitation of the owner's *rei vindicatio*. If an owner culpably creates the impression that another is the owner of property which is in fact his, and a third party, acting on this misrepresentation, obtains the property from that other person, the owner will be estopped from reclaiming the property with his or her *rei vindicatio*. Obviously estoppel can apply only if all the requirements for estoppel have been met, which in this case includes fault in the form of negligence on the part of the owner. (See *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A); *Adams v Mocke* 23 SC 782; *Morum Bros Ltd v Nepgen* 1916 CPD 392; *Ross v Barnard* 1951 (1) SA 414 (T); *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A); *Kajee v HM Gough (Edms) Bpk* 1971 (3) SA 99 (N); *Oakland Nominees (Pty) Ltd v Gelria Mining &*

Investment Co (Pty) Ltd 1976 (1) SA 441 (A); *Barclays Western Bank v Fourie* 1979 (4) SA 157 (C); and *Pretorius v Loudon* in the previous study unit.)

8.2.1 The effect of a successful reliance on estoppel against the *rei vindicatio*

What is the effect of a successful reliance on estoppel against the *rei vindicatio*? The following example can be used to illustrate this issue:

example

A, the owner of something, represents to C that B is the owner and acting on this representation, C buys it from B. According to Van der Merwe C has not become the owner of the thing even though he may successfully rely on estoppel to rebut A's claim to the thing in question. The reason for this is that B cannot transfer to C more rights than he himself has (the *nemo plus iuris* rule). This view would mean that where in this example C alienates the thing to D, A would be able to claim the thing from D with the *rei vindicatio* because the latter would not be able to raise estoppel against A.

This consequence can be avoided only by accepting that a successful defence against the *rei vindicatio* of an owner and the upholding of the impression that transfer of ownership has been effected in some way recognised by law, do in fact mean that ownership has passed. In this way legal certainty can be attained and the need of modern legal intercourse to protect the *bona fide* acquirer of the property (in the position of D in our example above) can be served. This, indeed, is the view of authors like Van Heerden 19 and Louw 218. Strictly speaking, this does not mean that estoppel constitutes a **method** of acquiring ownership; estoppel is only a legal remedy through which a factual impression is upheld and in the above example this may include the impression that B had the authority to alienate the thing in question to C. The fact that A is estopped from relying on the truth necessarily has the implication that the false impression created by him (that C may alienate the property) is regarded as the truth, with all the normal consequences that flow therefrom, including transfer of ownership.

In a similar vein Visser and Potgieter 43 state:

It is submitted that the view that estoppel does not create rights (including ownership) is untenable. The function of estoppel should not merely be to estop someone from denying the truth of a representation made by him, but to accept the representation as the truth. This is why it is also required that estoppel cannot operate in circumstances where its application would produce a result which is repugnant to the law [study unit 7]. The implication is clear: if the result of upholding estoppel is not contrary to the law and public policy, there is no reason why the representation should not in law be deemed to be the truth for all purposes. It seems unrealistic and artificial to accept that when estoppel is upheld one is still dealing with a shadow world of untruth.

Rabie and Sonnekus 203–204 are more cautious:

It is suggested that if there is to be a change in the law of the nature proposed, consideration should be given to the question whether the proposed right of the possessor to acquire ownership of the property

concerned should be unqualified or whether it should be subject to qualifications in favour of the owner. For example, should an owner who is deprived of his ownership lose it for all time, or should he, as would seem to have been the position in seventeenth century Holland, be given an opportunity of getting it back by paying to the new owner what he paid for it — or perhaps, such other sum as may be considered to be reasonable? ... A further question which arises is whether there can be any real need for the suggested rule in the case of immovable property. A person who contemplates acquiring immovable property can usually, by consulting the relevant property registers, establish the identity of the owner of the property, and once he has done that, he can take steps to satisfy himself as to the authority of anyone who represents that he has the authority to deal with the property.

Ultimately the Supreme Court of Appeal, or possibly the legislature, will have to speak the final word on this issue.

8.3 ESTOPPEL AND REPRESENTATION IN TERMS OF MANDATE

The contract of mandate can be the source of two legal phenomena: firstly it is the source of the relationship of *mandans-mandatarius* with its attendant rights and duties, and secondly it is the source of authority (*volmag*), that is the power of the *mandatarius* to enter into juristic acts for and on behalf of the *mandans* (principal). Authority must be distinguished clearly from the obligations which flow from the contract of mandate.

In the contract of mandate the doctrine of estoppel is applied mainly in two instances. In the first place there may be a situation where no real authority flows from a contract of mandate, but where an appearance of authority has been created by the contract. The possibility thus arises that third parties may be misled by the fact that a mandatory's conduct falls within this ostensible authority. Secondly, an actual existing authority may be more restricted in its extent than it appears to third parties. In this case, third parties may be misled by an act of the mandatory (representative) which appears to fall within the bounds of this actual existing authority. In other words, a false impression may be created in respect of

- the **existence** of the authority
- the **extent** of the authority

When viewed scientifically, the application of the principles of estoppel in cases where an ostensible authority exists or where an act appears to fall within an actual existing authority, should pose no particular problems. In each case one should simply determine whether all the requirements for a successful plea of estoppel are present. The following principles may also be deduced from the application of estoppel in this regard:

- Private instructions from the principal to his or her representative (the mandatory) cannot affect third parties who enter into juristic acts with the representative.
- Where the authority of a representative has been terminated by his or her principal, the latter is still liable to third parties with whom the representative has entered into juristic acts, if such third parties were

ignorant (or could not reasonably be expected to have known) of the termination of his or her authority.

8.4 ESTOPPEL AND PARTNERSHIP

The general rule in partnerships is that partners have the capacity to bind one another in matters relating to the partnership. This capacity of a partner may be restricted by agreement between the partners, in which case one partner cannot bind his or her fellow-partners as against third parties. However, persons who enter into agreements with a partner in good faith, unaware of the restriction on the particular partner's power, may hold the partnership liable. Our common law knew these principles before estoppel was introduced into our law (De Wet 72).

If, by his or her word or deed, a person creates the impression that he or she is a partner when in reality he or she is not, he or she will be held liable as if he or she were a partner, both in terms of common law and by virtue of estoppel, by third parties dealing legally with the partnership.

The partnership is dissolved when a partner resigns from it. As you know, the former partner is not liable for debts incurred by the new partnership after his or her resignation. Although he or she is no longer a partner, in certain circumstances he or she can nevertheless be held liable as a partner by persons who have dealt with the firm in the belief that he or she is still a partner. This rule, too, was not an offshoot of the estoppel principles, but was known to our common law (De Wet 71).

Thus the application of estoppel makes no new contribution to the field of partnership.

8.5 ESTOPPEL AND THE CONCLUSION OF A CONTRACT

The crux of the problem we discuss here is whether the doctrine of estoppel plays, or should play, any part in causing the parties to a contract to be bound despite the absence of consent (*consensus*), in certain cases where mistake (*error*) is present at the time of contracting. There is no final clarity on this point in our positive law, and the opinions of various jurists diverge widely. The whole problem is further complicated by the fact that one of the most fundamental and controversial problems in private law, namely the basis of contractual liability, features prominently in the picture. Since the 19th century much has been written and many arguments have been raised about this tricky problem, but no solution has been found.

The question whether estoppel has a part to play in cases of mistake in the conclusion of a contract depends largely on one's views about the basis for the formation of the contract. If one accepts that the consent of the parties constitutes this basis — the so-called consent theory — it must necessarily follow that there can be no contract or contractual liability in the case of material mistake, that is mistake causing *dissensus*. This is also De Wet's point of view. However, it often happens that positive law regards a party as bound by apparent consent brought about by error. What is the basis of this liability? Does the law in fact accept, in conflict with the consent theory, that a contract

may come into being in certain circumstances despite the absence of consent, or is the party bound by the apparent consent because he or she is estopped from denying that the consent is real? Consistent in his application of the consent theory, De Wet justifies liability in cases of *dissensus* caused by a mistake, on the ground of the principle of estoppel.

Before we discuss the problem any further, it is necessary briefly to examine the traditional theories about the basis of contractual liability. According to the **consent theory**, the basis of the contract is the consent or agreement between the parties: "The entire law of contract rests on the 'will' as source of liability" (De Wet 73, our translation). Consent is present if the substance of the intention of the one party tallies with the other party's understanding of this intention. This understanding of the intention is the reliance existing on the part of the latter. Thus consent exists when intention and reliance coincide. The one party can have an understanding or impression of the other's intention only if this intention is made known to him or her — this is done by means of statements of intent (taking the form of offer and acceptance). The necessity of statements of intent to achieve conscious consent often gives rise to error and *dissensus* instead of *consensus*, owing to the possibility of mistake and misunderstanding about the substance of the intention expressed in the statement.

According to the **declaration theory**, the basis of a contract consists of corresponding statements or expressions of intent, and not necessarily the presence of actual consent. For example, A says to B: "I'll sell you my watch for R10." In fact A **wishes** to sell the watch for R20. B says: "I'll take it!" There are corresponding **statements of will or intent** (offer and acceptance), that is the buying and selling of a watch for R10. A contract comes into being; the fact that A's statement of intent does not tally with his actual intention is irrelevant. De Wet's criticism of this theory, namely that it negates the intention of both contracting parties, is unimpeachable.

According to the **reliance theory**, the basis and contents of a contract are constituted by the reasonable reliance, that is the impression or understanding of the one party's intention, which is formed by the other party. For example, A says to B: "I'll sell my watch to you for R10." But A speaks very indistinctly and B forms the (reasonable) impression that A wants to sell the watch for R1, and says: "I'll take it!" A contract comes into being on the strength of B's reasonable reliance; what the contents of the contract consist of is the fact that A and B buy and sell for R1. Here there is still an error in the sense that the intentions of the parties do not tally, but this is irrelevant. The contract comes into being on the strength of the reasonable understanding or impression formed by a party in regard to the substance of the intention of the other party. De Wet and Van Wyk hold the view that such reliance can form an acceptable basis only if the impression formed is a **reasonable** one **and** if, from the other party's point of view, that other party's statement of his intention was **unreasonable** (that is, a result of blameworthy conduct). If A's statement of intent was unreasonable and showed lack of care in the sense that it could reasonably have given rise to a misunderstanding, there will be sufficient ground for demanding that B's reasonable reliance be upheld. The requirement of "reasonable reliance" finds expression in our case law in the requirement of "reasonable mistake" (*iustus error*). The additional qualification, that is that the statement of intention must be unreasonable, can mean, for example, that in a case like the following no contract comes into being. A completes a telegram form clearly and sends it to B: "I offer my watch for sale at R10." The telegram reaches B and B reads that the watch is for sale for R1. B's impression that A wishes to sell the watch for R1

is certainly reasonable, but A's conduct is equally reasonable. In such a case there should be no contract, even in terms of the reliance theory. However, had A completed the form untidily and illegibly, his conduct would have been unreasonable and a contract would have come into being.

Pieters & Co v Solomon

How do our courts handle the problem of liability in the case of mistake at the time of contracting? In *Pieters & Co v Solomon* 1911 AD 121, P undertook to pay B's debts. P then examined B's books and found that B owed S the amount of £345. S sent P a letter in which he averred that B owed him £490. Although P did not intend to pay £490, but only £345, P's offer to pay B's accounts and the sending of S's letter to P, created a reasonable impression in S's mind that P had offered to pay £490. The court upheld S's reliance and found that a contract to pay £490 had come into being. Here there was no *consensus* (and according to the consent theory, no contract) but, nevertheless, the court held that a contract had in fact come into being despite the mistake, on the ground of the (unreasonable?) creation of a reasonable impression (see 130 and 137 of the judgment).

Hodgson Bros v SAR

In *Hodgson Bros v SAR* 1928 CPD 257, the facts were the following: In a letter H offered a truck to the SAR for sale for £500. The matter was referred to a department which had no knowledge of the price asked by H. The department was prepared to pay £300, and wrote a letter to H undertaking to buy the truck but negligently failing to mention any price. Did a contract come into being? If so, on what terms? The court held that the SAR had unreasonably created the impression in H's mind that the truck was being bought for £500; therefore, in spite of the *dissensus* a contract had come into being.

In numerous other cases our courts have also held that a contract has come into being where an impression has been created in an unreasonable manner, despite the absence of consent (see *National and Overseas Distributors Corp (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A)). These cases accept some form of the **reliance theory** as basis for contractual liability in cases of *error*. (See also *Sonap Petroleum (SA) Ltd v Pappadogianis* 1992 (3) SA 234 (A); *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A).)

estoppel

In a few cases the court was inclined, in principle, to accept estoppel as a means to hold parties to a "contract" in the absence of real *consensus*.

Van Ryn Wine and Spirit Co v Chandos Bar

In *Van Ryn Wine and Spirit Co v Chandos Bar* 1928 TPD 417, X, the representative of R, obtained orders for liquor from C and fraudulently represented to C that C would receive a discount if he paid cash to X. C did this, and although he received invoices stating the price of the liquor with every consignment, which differed from the price paid to X, he ignored them. R then sued C for payment of the prices as stated on the invoices. C denied that he had contracted at those prices. R averred that C was estopped from denying the existence of consent, since by receiving the invoices without comment, he had given the impression that he was contracting at the prices reflected in the invoices. R thus attempted to bind C, not in terms of the contract, but in terms of estoppel; C had created the impression that a contract did in fact exist and was now estopped from denying the existence of the contract, therefore he was bound **as if** there were a contract. (Note that there was no contract.) The court held that C was not estopped from proving *dissensus*, since his conduct had been reasonable and without *culpa* (see in particular p 424 of the report). In *Peri-Urban Areas Health Board v Breet NO and Another* 1958 (3) SA 783 (T), the court also accepted in principle that a party could be bound to a "contract" on the ground of estoppel where consent was absent.

Therefore, we note that whether the doctrine of estoppel or the reliance theory is applied, the practical result is the same: in certain cases of mistake at the time of contracting the parties remain bound despite the *dissensus*. However, the basis of liability differs according to whether the doctrine of estoppel or the reliance theory is employed: in the case of the former, there is **no contract in terms of substantive law**, but the parties to the “contract” are held liable as if a contract had come into being (a fiction, therefore); in the latter case a contract does exist in terms of substantive law. On closer examination the requirements to be met to establish liability on the basis of estoppel correspond materially to the requirements for the application of the reliance theory: in terms of estoppel, one party must culpably create an impression *vis-à-vis* the other party in regard to his intention, and the other must reasonably rely on it; in accordance with the reliance theory there is a contract if the one party unreasonably (culpably, therefore) creates a false (though reasonable) impression in the mind of the other in regard to his intention.

If one accepts that consensus need not necessarily be the only basis for contractual liability, there can be no objection in principle to raising reliance to the status of the basis of the contract. There are, however, material objections to the application of estoppel in this regard:

- The general principles for a successful reliance on estoppel are intermingled with the requirements for contractual liability. The requirement of **prejudice** in the case of estoppel (see study unit 5), in particular, creates some complications. The essential question is whether the mere entering into a “contract” in reliance on the apparent consent of the other party constitutes prejudice. The viewpoint of De Wet and Van Wyk 20–23 is that the parties will not be bound where the mistake is discovered before any patrimonial prejudice has been suffered. The objection to this is that the innocent party ought not only to be protected against prejudice, but that his reasonable expectations also ought to be fulfilled. Of course, this result can be achieved by watering down the requirement of prejudice (as in the abovementioned *Peri-Urban Areas Health Board v Breet* 790). However, it could be argued that this gives the concept of prejudice an artificial meaning.
- The fact that in this regard estoppel implies that there is not really a valid contract, but only the appearance of a contract which is upheld *inter partes*, means that the innocent party has nothing which can be ceded to a third party (at least not before the mistake is discovered). In a situation like this, estoppel clearly cannot create rights in favour of a third party, and this is both impractical and unsatisfactory.

Although, initially, the Appellate Division expressly indicated that estoppel may be applied in cases of dissensus (*Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A)), in *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) at 240 it rejected estoppel as a solution in such instances, albeit *obiter*.

In conclusion, it is submitted that (real) consent ought to be regarded as the basis of contract, and that the reliance theory provides a supplementary basis where a reasonable impression was created in an unreasonable manner. Estoppel remains a solution in appropriate instances although the need for it in the sphere of contractual mistake has been greatly diminished by acceptance of the reliance theory.

8.6 ESTOPPEL AND WAIVER OF RIGHTS

In essence, waiver of rights or powers requires that there be an intention (and the statement thereof) to waive a particular right or power. Even when a person does not waive his rights expressly or tacitly, he may be estopped from denying a waiver as a result of his conduct which creates the impression that he has waived them (*Mahabeer v Sharma* 1985 (3) SA 729 (A)).

SELF-ASSESSMENT

- (1) A, the owner of a thing, creates the impression that B is the owner of it, and C, reacting on the strength of this impression, buys the thing from B. When A claims the thing from C, C raises estoppel. The court finds in C's favour. Has C now become owner of the thing? Discuss in detail, citing the opinions of writers.
- (2) Briefly explain the two most important applications of estoppel to the field of representation in terms of mandate.
- (3) Briefly explain the contribution of estoppel to the field of the law of partnership.
- (4) May estoppel play any part in causing contracting parties to be held bound in the absence of consensus? Explain in detail.
- (5) Explain very briefly what part estoppel has to play in the case of waiver of rights.

FEEDBACK

- (1) See 8.2. It is important here to note the difference between estoppel as a means of acquiring ownership of a thing and estoppel as a means to prevent the owner of a thing from claiming it with the *rei vindicatio*. In the former instance the successful estoppel-asserter becomes the actual owner of the thing, while in the latter instance the estoppel-asserter does not become owner. Have you considered the practical consequences of this distinction? Compare the situation where personal as opposed to real rights are involved. Should the same argument apply?
- (2) See 8.3. Have you considered practical examples to help you to understand the potential problems that may arise in this regard? It might be helpful to review the general requirements for the application of estoppel when considering this matter.
- (3) See 8.4. Generally speaking this aspect should not give you any difficulties. Review the requirements for successful reliance on estoppel when considering this section.
- (4) See 8.5. You must refer to theories concerning the basis of contractual liability in your answer. An important aspect to consider here is that the application of the reliance theory to the law of contract and its application to estoppel are related. In fact, the reliance theory evolved from estoppel. It is therefore not surprising that some of the elements for a successful reliance on estoppel have caused problems when applying

the reliance theory to the law of contract. To date it is still unsure to what extent fault and prejudice may play a role in the application of the reliance theory. Have you considered the similarities and dissimilarities between the upholding of a fictitious contract by way of estoppel and a contract based on the reliance theory? Do you think either is preferable as regards contract law?

- (5) See 8.6. Remember to review the requirements for successful reliance on estoppel when considering this aspect. Have you considered practical scenarios illustrating the functioning of estoppel in this context?

FEEDBACK: PRACTICAL SCENARIOS

Scenario 1

In our law the owner's claiming of his or her property which is in the hands of another by means of the *rei vindicatio* is based on the Roman principle of *ubi rem meam invenio ibi eam vindico* (where I find my property, that is where I claim it). According to Van der Merwe, C has not become the owner of the thing even though he may successfully rely on estoppel to rebut A's claim to the thing in question. The reason for this is that B cannot transfer to C more rights than he himself has (the *nemo plus iuris* rule). This view would mean that where in this example C alienates the thing to D, A would be able to claim the thing from D with the *rei vindicatio* because the latter would not be able to raise estoppel against A. However, an owner's *rei vindicatio* may be restricted where he or she entrusts his or her property to a factor (an agent for sale) for selling, and the factor, exceeding the bounds of his or her authority, sells the goods. The owner can reclaim his or her property with the *rei vindicatio* only if the buyer has connived with the factor to defraud the owner. However, in *Pretorius v Loudon* 1985 (3) SA 845 (A), doubt was expressed about the question whether this exception applies in our law. See question (1) and 8.2 in this regard. Consider whether there is a need for this rule in South African law.

Scenario 2

The partnership is dissolved when a partner resigns from it. The former partner is not liable for debts incurred by the new partnership after his or her resignation. Although he or she is no longer a partner, in certain circumstances he or she can nevertheless be held liable as a partner by persons who have dealt with the firm in the belief that he or she is still a partner. This rule was not an offshoot of the estoppel principles, but was known to our common law (De Wet 71). Thus in this scenario X could possibly be held liable for the debts of the partnership. The question is whether in the circumstances he indeed had a duty to inform Y that he had resigned from the partnership. See question (3) and 8.4 in this regard.

Scenario 3

The facts in this scenario closely resemble those in *Hodgson Bros v SAR* 1928 CPD 257 where the court found that S had unreasonably created the impression in H's mind that the truck was being bought for the larger amount (ie

R50 000,00 in the scenario); therefore, in spite of *dissensus* a contract had come into being. This case is often construed as one dealing with a contract based on the reliance theory in the absence of *consensus*. However, it is equally plausible to find that a fiction of a contract existed between the parties based on estoppel, but since the reliance theory gives rise to an actual contract while estoppel only maintains the fiction of one, the reliance theory is the better option to follow in the circumstances. See question (4) and 8.5 in this regard.

THE BASIS AND NATURE OF ESTOPPEL

OVERVIEW

The previous study unit we dealt with various practical applications of estoppel. In this study unit we consider a number of theories concerning the basis of estoppel. We look at: (1) the *exceptio doli*; (2) the adagium *nemo contra suum factum venire debet*; (3) the protection of good faith; (4) misrepresentation; (5) estoppel as a rule of the law of evidence; and (6) estoppel as a legal remedy *sui generis* (a remedy unrelated to others).

SELF-EVALUATION GOALS

After completing this study unit you should be able to

- explain whether the basis of estoppel in South African law is to be found in the *exceptio doli*
- explain whether the basis of estoppel in South African law is to be found in the adagium *nemo contra suum factum venire debet*
- explain whether protection of good faith is the basis of estoppel
- explain whether the basis of estoppel is to be found in a delictual action for misrepresentation
- enumerate the differences between estoppel, the *actio legis Aquiliae* and the interdict
- explain whether estoppel is a rule of the law of evidence
- discuss whether estoppel is a remedy *sui generis*

PRESCRIBED CASE LAW

Oaklands Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd 1976 (1) SA 441 (A)

ADDITIONAL READING MATERIAL (OPTIONAL)

The exceptio doli and the adagium nemo contra suum factum venire debet

Rabie LAWSA par 654

Rabie & Sonnekus 27–30

Kerr “Vonnisbespreking” 1981 THRHR 88

Baumann v Thomas 1920 Ad 428

North Vaal Mineral Co Ltd v Lovasz 1961 (3) SA 604 (T)

Oceanair (Natal) (Pty) Ltd v Sher 1980 (1) SA 317 (D)

Bank of Lisbon and SA Ltd v De Ornelas 1988 (3) SA 580 (A)

The protection of good faith and misrepresentation

Hoffman & Zeffert *The SA law of evidence* 355–356 (pars (b) and (c))

Rabie & Sonnekus 30

Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A)

Biloden Properties (Pty) Ltd v Wilson 1946 NPD 736

Mann v Sydney Hunt Motors (Pty) Ltd 1958 (2) SA 102 (G)

Estoppel as a rule of the law of evidence and estoppel as a legal remedy *sui generis*

Rabie & Sonnekus 15–18

9.1 INTRODUCTION

In study units 1 and 2 you were introduced to the concept “estoppel” and its reception in South African law. Then certain general requirements for a successful reliance on estoppel were discussed in study units 3 to 7 and the application of estoppel certain practical instances was addressed in study unit 8. This study unit examines the nature and basis of estoppel from a theoretical viewpoint, which is important to gain an understanding of not only the doctrine but also how it may possibly be developed in future.

9.2 THE EXCEPTIO DOLI

In *Waterval Estate & Gold Mining Co v New Bullion Gold Mining Co* 1905 TS 717, Curlewis J held: “The term ‘estoppel’ has indeed been generally adopted in practice in South Africa as a more convenient expression for that form of defence which was known under Roman law as the *exceptio doli mali ne cui dolus suus per occasionem juris civilis contra naturalem aequitatem prosit*” (“so that nobody benefits from his bad faith through the subtleties of the *ius civile*, against the principles of natural justice”) (see D 44 4 1 1).

The same idea, namely that the doctrine of estoppel was based on the *exceptio doli*, was accepted in *Baumann v Thomas* 1920 AD 428 and *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A), among others. In *Oceanair (Natal) (Pty) Ltd v Sher* 1980 (1) SA 317 (D) estoppel (as far as requirements and validity are concerned) was equated with the *exceptio doli* on the strength of this argument.

The question which arises is whether the basis of estoppel can indeed be found in the *exceptio doli* of Roman law.

The *exceptio doli specialis* (also known as the *exceptio doli praeteriti*) is aimed at fraud committed in the past. Fraud is intentional misrepresentation. The *exceptio doli specialis* does not cover all cases of liability based on estoppel, since negligent misrepresentation also serves as a ground for the defence of estoppel in our law.

The *exceptio doli generalis* (*exceptio de praesentis*) is aimed at fraud being committed at present. The *exceptio doli generalis*, differing in this respect from the *exceptio doli specialis*, embodies no single substantive principle of liability, and consequently the basis of estoppel must be sought elsewhere. “Owing to

the generality of its wording the *exceptio doli generalis* became the most important instrument with which to soften the *jus strictum*. The *exceptio doli generalis* did not contain a general principle; it was solely an aid with which new law could be introduced into every area of the *jus strictum*" (De Wet 85; our translation). Compare the comments of Jansen J in *Northvaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 on page 607 and *Hauptfleisch v Caledonian Divisional Council* 1963 (4) SA 53 (C). In Roman law the *exceptio doli generalis* was pre-eminently the general method used to introduce new law which would conform with the changed legal conscience of the community.

Dolus was initially also required for the *exceptio doli generalis*, that is, the plaintiff would be acting *dolo* by instituting his action at the time, *nunc petendo*, knowing that he had no right, although he had an ostensible right in terms of the *ius strictum*. It immediately becomes apparent that the real reason why the plaintiff could not succeed was not because of his so-called bad faith, but because he had no claim. The requirement of bad faith was subsequently abandoned. The *exceptio doli generalis* was freely employed to introduce new law, even when there was no hint of misrepresentation. The real basis of the failure of the plaintiff's claim must always be sought outside the framework of the *exceptio doli*. In our law, where judgments have been given based on the *exceptio doli generalis*, a far more fundamental *ratio* for the judgment can always be given (see De Wet 87 *et seq*). De Wet 89 concludes:

The conclusion at which I have arrived is that the *exceptio doli generalis* does not contain a principle of liability and that it therefore cannot form the basis for liability by estoppel. The *exceptio doli specialis* does contain the principle of liability, that is, liability in respect of damage caused by malicious misrepresentation; but it is not wide enough to cover all cases of estoppel. (Our translation.)

Kerr 90 cites the common denominator between estoppel by representation and the *exceptio doli*: Both require an investigation into the equity or inequity of the action which the plaintiff institutes. However, this so-called common factor is so vague that it is meaningless for all practical purposes. Kerr nevertheless points out that, in *Oceanair (Natal) v Sher* 1980 (1) SA 317 (D), the authority on which the court relied for the proposition that the requirements for estoppel are the same as the requirements for the *exceptio doli*, is not really persuasive. He points out (90–91) the following differences between the *exceptio doli* and estoppel: the *exceptio doli* can be used only as a defence while the plaintiff is also entitled to invoke estoppel; and the *exceptio doli* is available even though the plaintiff has done nothing to influence the defendant to take up the position in which he finds himself (eg the *exceptio doli* invoked by a *bona fide* possessor who has not been compensated for improvements effected by him), while estoppel requires that the conduct of the estoppel-denier must have caused the estoppel-asserter to act to his prejudice.

Whatever the theoretical objections to the premise that the *exceptio doli* is the basis of estoppel, the doctrine of estoppel was introduced into our law on the passport of the *exceptio doli* (see *Connock's (SA) Motor Co v Sentraal-Westelike Ko-op* 1964 (2) SA 47 (T); Rabie *LAWSA* par 654). However, this does not mean that at present the application of estoppel should be in accordance with the principles of the Roman *exceptio doli*. In any event, in *Bank of Lisbon and SA Ltd v De Ornelas* 1988 (3) SA 580 (A), our Appellate Division decided that the *exceptio doli* of Roman law never became part of Roman-Dutch law and certainly does

not form part of South African law today, and this puts paid to any reliance on the *exceptio doli* as a common-law (ie Roman-Dutch) basis for estoppel.

9.3 THE MAXIM *NEMO CONTRA SUUM FACTUM VENIRE DEBET*

In *Smit v Smit's Executor* 14 SC 142 Lord de Villiers expressed the view that the principles of estoppel are embodied in the maxim *nemo contra suum factum venire debet* ("no one may go against his own act").

This maxim did not enjoy universal application in Roman law. As De Wet 89 points out, the expression on its own is meaningless. It makes sense only if the *factum* is qualified. Only when the *factum* is a definite expression of intention, by which a person wishes to bind himself, can he or she (by means of reliance on the maxim concerned) be prevented from denying it. It is not, however, the basis of estoppel. In the case of estoppel the intention to be bound is not required — not even the intention to create a particular impression is required.

There are, however, supporters of the view that the basis of estoppel is a contract, express or implied, in terms of which the parties are supposed to have agreed that certain facts either exist or do not exist — even if the facts should prove inconsistent with reality. For example, where an ostensible authority is created, the principal responsible for the false impression is precluded from maintaining the true state of affairs as against the deceived third party, for the very reason that he has agreed with that third party to accept as true a state of affairs which differs from that which actually exists. By his acting on the strength of the misrepresentation, the third party is then deemed to have accepted the offer.

Such an agreement is usually a sham, and often most artificial at that. See the remarks of Greenberg J in *Van Ryn Wine and Spirit Co v Chandos Bar*: "Cases may arise in which there is in fact no mutual consent and accordingly no contract." One might also ask the supporters of the contractual basis of estoppel how an intention can be construed in cases of negligent misrepresentation.

Although a person can be estopped where he brought another under the impression that he wished to be bound, the view of Lord de Villiers that the principle of estoppel is embodied in this maxim cannot be accepted without qualification. The maxim may indicate the functioning of estoppel, but not its actual basis.

9.4 PROTECTION OF GOOD FAITH

The basis of estoppel is sometimes sought in the protection of good faith. Of course, protection of *bona fides* also occurs over and above the principles of estoppel (cf the doctrine of notice, prescription, position of the *bona fide possessor*, etc), but the characteristic feature of estoppel is the fact that good faith is protected **by the maintenance of the impression created**. As has been explained previously, the injured party must have acted in good faith. If he or she has not done so, he or she has not been misled. From the point of view of the injured party, estoppel manifests itself in the protection of the impression created.

All this is perfectly true, but it still does not explain why the person creating the impression loses his or her rights or incurs obligations. The reason is not purely that the injured party acted in good faith, because a person's reliance will not be maintained in every case where he or she has acted to his or her prejudice.

According to some, the mere fact that one person acts in good faith is certainly not sufficient reason for depriving another of his or her rights or saddling him or her with obligations. Only when the other person has created the impression **in a culpable manner**, will it be justified. Only fault can justify the loss of a right. Accordingly De Wet states at 99: "The reasonable good faith of the one can only be protected as against another person if that other person has intentionally or negligently instilled trust in the other" (our translation). Even so, there are cases where good faith is protected by estoppel in the absence of fault.

The requirement of good faith embodies the requirement of misrepresentation but not the requirement of fault or the other requirements of estoppel. The impression created is maintained, not because the prejudiced party has acted in good faith, but because all the requirements for estoppel are present. Where fault is required for estoppel, the basis may perhaps be sought in the protection of good faith as a result of **culpable misrepresentation**. However, this is not a general explanation of estoppel.

9.5 MISREPRESENTATION

In our law intentional or negligent misrepresentation may in the first place lead to delictual liability. In appropriate instances, however, the party misled may rely on the principles of estoppel instead of instituting a delictual action.

In Roman, English and also South African law, it was originally only **fraudulent misrepresentation** or fraud that founded an action in delict on the part of the person misled (see *Dickson and Co v Levy* 11 SC 36). The *actio de dolo malo* of Roman law was assimilated by the *actio legis Aquiliae*.

In Roman law a defrauded person, when sued, would have been able to rely on the *exceptio doli specialis*. In English and South African law he or she can plead estoppel, provided — and this is important to bear in mind — that the circumstances are such that the impression created can be maintained. A person cannot plead estoppel in every case of fraud. For example, he or she cannot plead estoppel if he or she was injured or if his or her property was damaged as a result of the fraud. In cases of **fraudulent misrepresentation**, the deceived party may, depending on the circumstances, avail himself or herself of the following remedies:

- (1) An action in delict.
- (2) Estoppel.
- (3) Where the fraudulent misrepresentation (fraud or deceit) gives rise to a contract, but material error is not at issue (thus, where the misrepresentation does not cause *dissensus*), the aggrieved party can resile from the contract **and** claim damages or compensation calculated on the basis of negative *interesse*. This remedy has the same effect as a

claim in delict, namely the compensation of damage, and we need not explore this any further for present purposes.

In the sphere of **negligent misrepresentation**, liability by way of *exceptio* preceded liability by way of *actio*: in Roman law the *exceptio doli generalis*; in English and South African law, estoppel (see De Wet 100 *et seq*).

In English law, no delictual action for negligent misrepresentation was available until fairly recently. Only deceit (intentional misrepresentation) founded an action for misrepresentation (*Derry v Peek* 14 AC 337; *Candler v Crane, Christmas & Co* (1951) 2 KB 164). In *Hedley Byrne v Heller* 1964 AC 465, however, it was decided that a claim based on negligence could also succeed in cases of misrepresentation. Liability for negligence exists where the wrongdoer acts contrary to a legal duty (the so-called duty of care). Although English law has not been settled in regard to general rules determining the existence of such a duty (see for example *Anns v Merton London Borough Council* 1978 AC 520; *Junior Books Ltd v Veitchi Co Ltd* (1983) 1 AC 520; *Leigh and Sullivan v Aliakmon Shipping Co Ltd* 1986 AC 785; *Murphy v Brentwood District Council* [1990] 2 All ER 908 (HL)), at least it has been settled that, in principle, negligent misrepresentation can found liability for negligence.

To a certain extent the *lacuna* existing before the recognition of a delictual claim for negligent misrepresentation, was compensated for by the fact that estoppel can be invoked in certain circumstances. Therefore, negligent misrepresentation could lead to liability in a roundabout way. The party misled sues the representor on the basis that the representation was a representation of the truth. Should the defendant attempt to rely on the true state of affairs in his plea, the plaintiff then pleads estoppel in his replication. Estoppel is invoked, not as an exception, but as a **replication — it still remains a defence**. The following example illustrates this:

example | A induces C to believe that B has authority to act on his (A's) behalf. Relying on this, C buys A's horse, Flash, from B. Should A sue C for return of the horse, C will plead estoppel. Should C sue A for delivery of the horse and A will plead B's lack of authority, then C will plead estoppel in his replication. In both cases the impression created is maintained.

example | Another example is to be found in the case of *Re Otto's Kopje Diamond Mines Ltd* (quoted by De Wet 102). A company negligently issued share certificates which created the impression that A was the holder of certain shares. X bought the certificates and applied to be placed on the registers. The company refused to do so. If X were simply to have sued the company directly for the damages suffered by him through the negligent misrepresentation, his claim would have failed, since in English law negligent misrepresentation *non parit actionem*. What he actually did, however, was to sue the company as if the representation were true. In other words, he claimed registration as a shareholder or, in the alternative, damages because of the failure to register him. The company did not wish to or perhaps could not follow the former course (eg because all authorised shares had already been issued). However, the company was prevented from relying on the true state of affairs by estoppel. Accordingly X succeeded in his claim for damages (see *Low v Bouverie* (1891) 3 ch 82).

In connection with the above, the frequently held view that “estoppel is not a cause of action” must also be dealt with. In English law these words simply meant that, unlike a fraudulent misrepresentation, a negligent misrepresentation could not directly form the basis of an action (see De Wet, 103). As we have stated, in England negligent misrepresentation could only indirectly lead to liability on the part of the person making the representation. Where circumstances were such that liability could not be enforced by means of estoppel pleaded as an exception or a replication, no liability for negligent misrepresentation existed in English law. The expression “estoppel is not a cause of action” should be construed in this sense only.

Following *inter alia* the judgments in *Perlman v Zoutendyk* 1934 CPD 151 and *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A), in which it was held that negligent representation was in fact a cause of action in our law, the expression “estoppel does not give a cause of action” should be of no significance to us. (It is obvious that estoppel cannot be an *actio* when estoppel is the technical name for the *exceptio* or *replicatio* based on misrepresentation. In this sense one can say that “estoppel gives no cause of action”, and it then has the same value as “the *exceptio doli* is no *actio*”.)

Yet in *Pandor's Trustee v Beatley and Co* 1935 TPD 358, this rule was still relied on. Quite apart from the fact that the court was at fault in still attaching any meaning to the rule in South African law at that stage, the facts of the case were such that there was no question of estoppel's being “a cause of action”. The expression was again considered in *Biloden Properties Pty Ltd v Wilson* 1946 NPD 736. Here certain leased premises were sold. The lessee gave notice of renewal of the lease, first to the original lessor and then to the new lessor. However, the agreement of lease was never expressly renewed. The lessee retained possession and paid the rental regularly. Fourteen months later the new lessor gave notice of an increase in rental. The lessee thereupon applied to court for a declaration of rights. The court held that, notwithstanding the fact that all the requirements of estoppel were present, the defence could not be raised, because “estoppel could not be used as a cause of action or to create a title”. Without giving its reasons the court simply relied on *Pandor's* case. The criticism of that case is equally applicable here. The fact that application is made for a declaration of rights does not exclude the defence of estoppel.

In *Mann v Sydney Hunt Motors (Pty) Ltd* 1958 (2) SA 102 (G) it was once again held that estoppel cannot found a cause of action. Apparently what the learned judge using the expression wished to say was simply that estoppel was not an *actio*. So, for example, Diemont J stated at page 107: “An estoppel pleaded by the plaintiff in his replication to meet allegations raised in the plea is not the same thing as an estoppel used in the declaration as an instrument of attack. In our law estoppel remains a weapon of defence.” (See Sir Norman Birkett CJ's words in *Combe v Combe* 1951 (2) KB 215 at p 224, where it was held that estoppel could not be used as a “sword” but only as a “shield”. Also see *Adriatic Insurance Co v O'Mant* 1964 (3) SA 292 (R).)

In concluding this section, the following points are emphasised:

Just as the *exceptio doli (specialis)* is a defence based on intentional or fraudulent misrepresentation, so too is estoppel a defence based on negligent misrepresentation. Estoppel is no more an *actio* than the *exceptio doli* is an *actio doli*.

However, this is not the sense in which the rule “estoppel is not a cause of

action” must be construed. The sense in which it should be understood is that the facts which form the basis of estoppel, that is negligent misrepresentation, do not constitute the basis for an action. In this sense the rule held true for English law, but certainly did not apply to contemporary South African law — in *Perlman v Zoutendyk* liability on the grounds of negligent misrepresentation was recognised in our law. This view was confirmed by the Appellate Division in *Administrateur, Natal v Trust Bank*. See also *Bayer South Africa (Pty) Ltd v Frost* 1991 4 SA 559 (A) regarding negligent misrepresentation inducing a contract.

Hence there is no difference in our law between negligent and intentional misrepresentation as far as remedies are concerned.

From the aforementioned it should be clear that the basis of estoppel should not simply be sought in **delictual** misrepresentation. Misrepresentation can give rise to delictual liability in terms of the *actio legis Aquiliae* and it can result in the remedy of estoppel. However, to try and simply force estoppel into the framework of the law of delict and to view it as yet another delictual remedy can give a warped picture. The first danger associated with such an approach is that the distinctive requirements for a plea of estoppel which have developed in legal practice over the years, are simply equated with the well-known requirements for delictual liability. It is clear from the discussion of the requirements for estoppel that the requirements for a successful plea of estoppel are not identical with the requirements for delict. One needs only to have regard for the requirements of fault and prejudice, as well as causation, and for the fact that for estoppel to succeed, the reliance on estoppel must be legally permissible. The latter requirement has no equal in the law of delict. These differences between the delictual requirements and those for a plea of estoppel can be explained on the basis of the important differences between the remedy of estoppel and delictual remedies in so far as their **nature, operation and purpose and function** are concerned.

These justifiable differences are also evident from a comparison between estoppel, the *actio legis Aquiliae* and the interdict:

- (1) Estoppel is not a remedy on which a plaintiff relies in his declaration. This remedy serves only as an answer or a defence in the replication or plea.
- (2) Whereas an interdict and an action *ex delicto* are available in the case of any type of unlawful conduct, estoppel is relevant only in the case of misrepresentation.
- (3) The aim of an action *ex delicto* is to recover monetary compensation for the damage suffered. The object of an interdict is to prohibit specified human conduct. Estoppel does not have either of these two functions: the effect of estoppel is that an impression which has been created, is upheld.
- (4) Fault is not required for an interdict, whereas it is a requirement for an action *ex delicto*; fault is a requirement for estoppel only in certain cases.
- (5) Whereas an action *ex delicto* is aimed at the recovery of damages, estoppel is aimed at the prevention of damage.

9.6 ESTOPPEL AS A RULE OF EVIDENCE

It is often maintained that “estoppel is a rule of evidence”, and indeed “a rule of evidence, which precludes a person from denying the truth of some statement previously made” (see De Wet 106). The contention that estoppel, invoked as an exception or replication, forms part of the law of evidence originates from nothing less than a confusion of ideas. Estoppel must after all be raised in the pleadings. The leading of evidence is that part of the process in which *allegata* or allegations are proved. It should therefore be quite obvious that evidence is not contained in the pleadings.

Furthermore, as De Wet 106 points out, estoppel is not a rule of evidence in the sense that it excludes evidence. Facts alleged by the parties in their pleadings, which have not been admitted, form the facts at issue. The more facts there are at issue, the more evidence will have to be led. A person relying on estoppel must plead the facts on which he or she relies, and in so doing he or she introduces more facts at issue in so far as they are not admitted. Only evidence which purports to prove the facts at issue is admissible. Hence the effect of estoppel is to make more evidence admissible, rather than to exclude it.

Because it is often contended that estoppel is a doctrine of the law of evidence, and not one belonging to substantive law, we find it dealt with in most works on evidence (eg Hoffmann & Zeffert *The SA law of evidence*).

9.7 ESTOPPEL AS A LEGAL REMEDY *SUI GENERIS*

It is probably correct to accept that estoppel is a legal remedy *sui generis*, which does not really correspond with either the *exceptio doli* or an action *ex delicto*.

Estoppel is a useful legal remedy introduced into our law under the influence of English law in order to fill an important gap in our legal system. It can only lead to confusion when the *sui generis* nature of estoppel is denied and it is forced into some or other category in our legal system. When the *sui generis* nature of estoppel is understood, its principles can be allowed to develop in accordance with the particular need which has to be served and without the distortion and confusion caused by dogmatism.

The application of and basis for estoppel ought not to be defined in more general terms than those made in the following remark in LAWSA paragraph 652:

Briefly stated, the doctrine of estoppel by representation consists in this, that a person is precluded, i.e. estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice.

This indicates the basis of estoppel and is also the reason for its existence.

SELF-ASSESSMENT

- (1) Is the basis of estoppel in South African law to be found in the *exceptio doli*? Explain.

- (2) Is the basis of estoppel in South African law to be found in the *adagium nemo contra suum factum venire debet*? Explain.
- (3) Does protection of good faith constitute the basis of estoppel? Explain.
- (4) Is the basis of estoppel to be found in a delictual action for misrepresentation? Discuss in detail.
- (5) State the differences between estoppel, the *actio legis Aquiliae* and the interdict.
- (6) Is estoppel a rule of the law of evidence? Explain.
- (7) Is estoppel a remedy *sui generis*? Explain briefly.

FEEDBACK

- (1) See 9.2. Your answer must take the following into account:
 - the fact that the courts have used the *exceptio doli* as justification for the introduction of estoppel into our law
 - the opinions of writers
 - the two forms of the *exceptio doli*
 - the view of the Appellate Division that the *exceptio doli* has not become part of South African law
- (2) See 9.3.
- (3) See 9.4.
- (4) See 9.5.
- (5) See 9.5.
- (6) See 9.6.
- (7) See 9.7.